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82-819
No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE JAY CROZIER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a district court may issue an order restraining the alienation of property named in an indictment as subject to forfeiture under 21 U.S.C. 848 without conducting a full evidentiary hearing subject to the Federal Rules of Evidence at which the government bears the burden of demonstrating that it is likely to convince the jury beyond a reasonable doubt both that the defendant is guilty of violating the continuing criminal enterprise statute and that the property at issue is subject to forfeiture.

2. Whether evidence discovered and seized pursuant to a valid, untainted search warrant should be suppressed because police had improperly entered the premises before the warrant was issued, although the evidence was discovered only after the warrant was procured.

3. Whether a warrant authorizing the seizure of, inter alia, "notes and formulas * * * which are [m]aterial evidence of violation [of] 21 U.S.C. 841, 846" is impermissibly general.

PARTIES TO THE PROCEEDING

In addition to the named parties, Manuel Isadore Pine, Alan Terry Stein, and Florence Margaret Wolke were defendants in the district court and are respondents here. Question 1 pertains only to Crozier and Wolke.

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CLARENCE JAY CROZIER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 674 F.2d 1293. The opinion and orders of the district court (Apps. C-F, *infra*) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1982 (App. A, *infra*, 1a). A petition for rehearing was denied on August 17, 1982 (App. B, *infra*, 13a). On October 8, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

21 U.S.C. 848 provides in pertinent part:

Continuing criminal enterprise
Penalties; forfeitures

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

* * * * *

Jurisdiction of courts

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

STATEMENT

Respondents were charged in an indictment returned January 14, 1981, with several offenses arising out of the manufacture and distribution of methamphetamine and phenylacetone.[1] In addition, Count Two of the

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[1] Count One charged all the respondents with conspiracy to manufacture, distribute, and possess with intent to distribute methamphetamine and phenylacetone, in violation of 21 U.S.C. 846. Count Two charged Crozier with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Counts Three, Five, Six, and Seven charged Crozier, Stein, and Wolke with various substantive drug offenses, in violation of 21 U.S.C. 841(a)(1). Count Four charged Crozier and Wolke with violation of the Travel Act, 18 U.S.C. 1952. Counts Eight, Nine, and Ten charged Crozier and Stein with tax evasion, in violation of 26 U.S.C. 7201. The indictment also charged seven other persons who were not beneficiaries of the suppression orders and hence were not appellees in the court of appeals and are not parties here.

indictment named certain property of respondent Crozier's as subject to forfeiture under 21 U.S.C. 848(a)(2) as the profits of a continuing criminal enterprise. The district court entered an order restraining respondents from disposing of this property without prior approval of the court.

Prior to trial, the district court granted respondents' motions to suppress evidence seized in two different searches (App. C, *infra*, 17a-20a). The court of appeals affirmed the suppression orders and, on respondents Crozier's and Wolke's appeal, vacated the restraining order and remanded to the district court to conduct an "appropriate" hearing with respect thereto (App. A, *infra*, 1a-12a).

1. a. On April 9, 1980, several Drug Enforcement Administration (DEA) agents conducted extensive surveillance, effected two arrests, and executed five search warrants as part of a seven-month investigation into the respondents' drug manufacturing and distribution activities in the Yuma, Arizona area.[2] On the previous evening of April 8, 1980, based on surveillance of Crozier and Stein, DEA agents had obtained a warrant to search the premises of Home Ranch, Inc., in Dome Valley, Arizona, for evidence of drug manufacturing. Early in the morning of April 9, 1980, the agents observed Crozier and Stein dump a trailer full of trash at a public disposal site. Examination of the trash revealed empty containers of several chemicals used in the manufacture of amphetamines.

Home Ranch was then searched pursuant to the search warrant, and evidence was found indicating that a clandestine drug manufacturing laboratory had been operating on the premises. DEA agents then arrested respondent Stein, who had returned to his residence

[2] The background of the investigation supporting the issuance of the search warrants is summarized in the affidavits underlying those warrants, which are appended to the government's brief in the court of appeals in C.A. No. 81-1484.

and left again, as he was driving on the highway in a 1980 Oldsmobile. Respondent Crozier was also arrested about an hour later as he was driving on the highway with three passengers in a Ford. Shortly after Crozier's arrest, the three passengers, including respondent Wolke, were permitted to drive away in the car because the agents did not believe that there existed probable cause for their arrest (III Tr. 481-484).[3]

b. Based on his belief that evidence at 12498 Avenue C, the Crozier residence, and 5417 Francis Street, the Stein residence, would be destroyed before search warrants then being applied for could be executed, DEA Agent Murphy ordered other agents to secure those two premises pending the issuance of a warrant.[4] Agents then entered the Crozier residence and conducted a protective sweep to determine if anyone was present who might be destroying evidence. The agents did not discover anyone, or any evidence, in the course of this sweep. Thereafter, they stationed themselves at the doors outside the residence until the warrant arrived. See II Tr. 189-194. Agents also entered the Stein residence, where three persons were present. The agents remained inside to ensure that no evidence would be destroyed, although the occupants were permitted to leave if they wished. See May 13, 1981, Tr. 67-77; III Tr. 368-413.

At about 7:00 that evening, search warrants were issued for both residences, and the warrants subsequently were executed by DEA agents. Chemicals and labo-

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[3] "Tr" refers to the transcript of the suppression hearing.

[4] Agent Murphy was aware that Crozier and Stein had already disposed of evidence of drug manufacture at the dump earlier in the day. Several associates of Crozier's were known to be at large, including at least three who were aware of his arrest, and there were not sufficient law enforcement personnel to keep all those persons under surveillance. The agents did not know whether or not anyone was present in the residences. See II Tr. 205-209; III Tr. 474-484; IV Tr. 558-560.

ratory equipment were seized from the Stein residence, and other incriminating evidence, including a formula for producing methamphetamine and other papers, was seized from the Crozier residence.

2. Prior to trial, the district court suppressed the evidence seized from the two residences.[5] With respect to the search of the Crozier residence, the court held that the warrant was overbroad.[6] The court also held that no exigent circumstances justified the warrantless entry to secure the premises. Accordingly, the court held that the agents had illegally seized the residence and its contents when they secured the premises and therefore that *United States* v. *Allard*, 634 F.2d 1182 (9th Cir. 1981), required suppression of the evidence subsequently discovered pursuant to the search warrant (App. C, *infra*, 17a-18a).

With respect to the search of the Stein residence, the court noted that the warrant differed from the warrant for the Crozier residence in that it did not describe any particular property, instead describing the property to be seized as "[m]aterial evidence of violation of 21 U.S.C. 841, 846 * * *." While the court noted that the underlying affidavit did describe with particularity certain property, it concluded that the warrant itself was impermissibly general. In addition, as with the search

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[5] The court denied motions to suppress evidence seized in searches of Home Ranch, the Oldsmobile that Stein was driving when he was arrested, and the Ford that Crozier was driving when he was arrested (App. C, *infra*, 14a-17a).

[6] The warrant described the property to be searched for as:

> Amphetamine, precursor chemicals including Methylamine, P-2-P, Ether, and Alchol [sic], and laboratory apparatus, notes, formulas, as well as any indicia of ownership and control of the premises[,] which are materal [sic] evidence [of] violation 21 USC 841, 846, (Manufacture and Possession with intent to distribute Amphetamine and Conspiracy).

United States in C.A. No. 81-1484, App. B.

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of the Crozier residence, the court held that *United States* v. *Allard*, *supra*, required suppression of the evidence (App. C, *infra*, 18a-20a).[7]

3. On January 14, 1981, a grand jury returned an indictment charging the respondents and others with various offenses arising out of their drug manufacturing activity (see page 3 & note 1, *supra*). Count Two of the indictment, which charged respondent Crozier with conducting a continuing criminal enterprise in violation of 21 U.S.C. 848, named three parcels of real property, numerous specific items of personal property, and all other property controlled by Crozier as subject to forfeiture under 21 U.S.C. 848(a)(2). On January 16, 1981, pursuant to the power expressly conferred by 21 U.S.C. 848(d), the district court entered an order enjoining and restraining Crozier, Wolke, and other persons from disposing of the property named in the indictment as subject to forfeiture, without prior approval of the court after notice to the United States (App. D, *infra*, 21a-25a). The order further provided, however, that court approval was unnecessary if the property was needed to pay for Crozier's and his dependents' "normal and average living expenses * * * including food, clothing, normal and average household expenses, medical care, utilities, normal and average expenditures for the upkeep of vehicles, and * * * for the care of animals" (*id.* at 24a). On March 18, 1981, the court granted a subsequent motion to supplement the restraining order by including two additional parcels of real property that were not named in the indictment but in which Crozier was alleged to have a forfeitable interest (App. E, *infra*, 26a-28a).

On April 17, 1981, respondent Crozier moved to have the restraining orders dissolved. Respondent Wolke

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[7] The court also suppressed evidence seized from the Stein residence on April 11, 1980, pursuant to a second warrant. That ruling was not appealed.

subsequently joined in the motion, and the court held a hearing at which counsel for both sides argued their positions. On May 13, 1981, the court denied the motion (App. F, *infra*, 29a).

4. a. Respondents Crozier and Wolke appealed the district court's denial of their motion to dissolve the restraining orders, arguing that due process requires a hearing either before or shortly after such an order is entered. The court of appeals reversed. The court rejected the government's contention that the restraining order was justified by the determination of probable cause underlying the indictment, stating that "[a] grand jury determination is not an adequate substitute for an adversary proceeding because a defendant has no opportunity to cross-examine witnesses and the government does not assume the burden of proof" (App. A, *infra*, 6a). Because Section 848(d) does not specify the requirements for determining when a restraining order should issue, the court of appeals held that the district court must apply Rule 65 of the Federal Rules of Civil Procedure and conduct an immediate hearing (App. A, *infra*, 7a). The court held that at this hearing "'the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the Continuing Criminal Enterprise statute and two, that the profits or properties at issue are subject to forfeiture under the provisions of section 848(a)(2).'" *Id.* at 7a-8a, quoting *United States* v. *Long*, 654 F.2d 911, 915 (3d Cir. 1981). The court of appeals remanded with directions to the district court to hold an appropriate hearing (App. A, *infra*, 8a).

b. The government took a limited appeal from some of the district court's suppression orders. That appeal was consolidated with the appeal from the restraining order, and the court of appeals affirmed the suppression orders.

With respect to the search of the Crozier residence, the court stated that the warrant "did not specify what notes, formulas, documents, or physical evidence should be seized" (App. A, *infra*, 8a). The affirmance of the suppression of this evidence appears to have rested at least in part on the court's conclusion that the warrant was impermissibly general (*id.* at 9a). The court also held that there were no exigent circumstances that justified the initial warrantless entry into the residence, noting that the agents did not know whether anyone was in the house when they entered (*ibid.*). Relying on *United States* v. *Allard*, *supra*, the court held that the evidence in the house was illegally seized when the agents entered and that the government had failed to carry its "burden to show that it would have independently discovered and obtained the evidence even if it had not been illegally seized" (App. A, *infra*, 10a).

With respect to the search of the Stein residence, the court again found that there were no exigent circumstances that justified the entry and, presumably, that the seized evidence therefore had to be suppressed under *Allard* (App. A, *infra*, 11a). The court also held that the warrant that authorized the search was overbroad. *Id.* at 10a-11a.[8]

REASONS FOR GRANTING THE PETITION

1. The decision of the court below reversing the entry of the order restraining disposition of property named by the grand jury as subject to forfeiture, and conditioning the imposition of such orders upon a show-

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[8] The court of appeals agreed with the government that the suppressed evidence should be admissible against defendants who had no legitimate expectation of privacy in the areas searched, and it remanded to the district court to make findings on that issue with respect to the non-resident defendants (App. A, *infra*, 11a-12a).

ing of probable guilt by the prosecution at a pretrial adversarial hearing, has grave practical impact on the availability of the forfeiture remedy prescribed by Congress for certain classes of unusually serious offenses and should be reviewed by this Court.

a. In enacting the RICO statute (18 U.S.C. (& Supp. IV) 1961 *et seq.*) and the continuing criminal enterprise proscription of the narcotics laws at issue in the instant case (21 U.S.C. 848), Congress sought to impose strict sanctions in an effort to deter some of the most serious types of criminal activity condemned by the federal criminal laws. One of the major weapons it placed in the prosecutor's arsenal was the power, upon conviction of these offenses, to obtain a forfeiture of a defendant's interest in or profits from his criminal enterprise. In the early years of enforcement of these statutes, which were enacted in 1970, relatively little recourse was had to the forfeiture remedies. During the last several years, however, the Department of Justice has placed increasing emphasis on the use of forfeitures as an effective means of deterring organized crime and large-scale illicit drug ventures by depriving those who would engage in such activities of the economic fruits of their crimes.

Also pertinent here is the long-established policy of the Congress, embodied in the Federal Rules of Criminal Procedure, to provide only limited discovery in criminal cases, confined to specific, narrowly defined classes of items enumerated in Fed. R. Crim. P. 16. Illustrative of this policy is the refusal of Congress in 1974 to adopt a proposed revision to Rule 16 providing for pretrial exchange of witness lists in criminal cases. In explaining its rejection of this expanded form of discovery, the Conference Committee stated:

> * * * [I]t is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal

> the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

H.R. Conf. Rep. No. 94-414, 94th Cong., 1st Sess. 12 (1975).

The decision of the court of appeals in this case gravely threatens the ability of these two important policies to coexist. The court required, as a prerequisite to imposition of a restraining order on forfeitable property, that the government prove at a full evidentiary hearing that it is likely to convince a jury of the defendant's guilt and the forfeitability of the property in question beyond a reasonable doubt. This requirement severely curtails the practical effectiveness of the criminal forfeiture remedy. The hearing contemplated by the court of appeals would be nothing less than a dress rehearsal of the trial, and the practical problems inherent in participating in such a hearing would dissuade prosecutors in most cases from even attempting to obtain a restraining order. Defendants would then be free to dispose of their forfeitable assets and convert them into assets that could not be traced or reached by the government. And, as noted, the effect of the decision is not limited to 21 U.S.C. 848, the particular forfeiture provision at issue here. The RICO statute contains a similar forfeiture provision, 18 U.S.C. 1963(a), and the Ninth Circuit has already followed the decision below as controlling precedent with respect to a restraining order issued pursuant to 18 U.S.C. 1963(b) in connection with a RICO forfeiture. *United States* v. *Spilotro*, 680 F.2d 612 (1982).

Any type of adversarial hearing at which the prosecution must demonstrate the defendant's guilt gives the defense an opportunity to discover the details of the government's case, even if the government's burden

can be satisfied simply by an agent or prosecutor giving a summary of the grand jury testimony. The full evidentiary hearing contemplated by the court of appeals creates even more severe practical problems.[9] The defense is given an opportunity to cross-examine the government's witnesses—at least equivalent to taking a deposition—thereby entirely defeating the policy of limited discovery in criminal cases.

Moreover, as long as hearsay evidence is barred at the hearing, the government is forced to expose its witnesses to the defense. In some cases, this will endanger the safety of the witnesses or expose them to pressures that may prevent them from testifying at trial. The types of cases in which Congress has provided for restraining orders—RICO and continuing criminal enterprise prosecutions—are precisely the cases in which the safety of potential witnesses is most likely to be a paramount concern because of the frequent involvement of organized crime. Indeed, in this very case the district court entered a protective order because it found that "premature disclosure of the identity of certain witnesses in this case may place the safety of such witnesses in jeopardy." Order of Mar. 24, 1981, granting government's Motion for Protective and Modifying Order concerning inspection and copying of exhibits, appended to United States Br. in C.A. Nos. 81-1345, 81-1355. Because of this practical constraint, the government has determined that, if the court of appeals'

[9] The court's decision does not specifically address the question of the procedures to be used at the hearing. Its focus on the opportunity to cross-examine witnesses (App. A, *infra*, 6a) and its citation to the Federal Rules of Civil Procedure suggest, however, that the hearing is to be conducted like a trial. The Ninth Circuit recently confirmed this reading, holding that the hearing required by the decision below must be held in accordance with the Federal Rules of Evidence and noting specifically that hearsay evidence would not be admissible. *United States* v. *Spilotro*, *supra*, 680 F.2d at 619 n.4.

decision stands, it will be forced to relinquish its efforts here to restrain alienation of the property under Section 848, rather than expose its witnesses at a pretrial hearing. Thus, the court of appeals' decision, which took no account at all of the critical discovery problems that it creates, will operate to prevent the government, as a practical matter, from effecting forfeitures in many cases where Congress intended that criminals be divested of their ill-gotten gains.

b. Quite apart from the undermining of the forfeiture provisions occasioned by the court of appeals' hearing requirement, which could not conceivably have been intended by Congress, the court is simply mistaken in its assertion that a restraining order in the absence of such a hearing must violate due process. An unbiased grand jury has already determined that there exists probable cause to believe that respondent Crozier is guilty of conducting a continuing criminal enterprise and that the restrained property is forfeitable under 21 U.S.C. 848, identifying in the indictment property subject to forfeiture. It is beyond dispute that the determination of probable cause in an indictment is sufficient, without any further hearing, to support pretrial restraints on a defendant's *liberty*. At a minimum these restraints will, like a restraining order with regard to alienation of property, require that the defendant be available for trial; and conditions of bail may go further in restricting the defendant's travel or other activities pending trial. And for many defendants, of course, an inability to post bail will result in actual imprisonment during the period between indictment and trial. For all these purposes, nevertheless, the grand jury's finding "conclusively determines the existence of probable cause." *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975); *Ex parte United States*, 287 U.S. 241, 250 (1932). See also *Giordenello* v. *United States*, 357 U.S. 480, 487 (1958). If an indict-

ment suffices to bring about these potentially serious restraints on the defendant's personal liberty, it is incongruous to hold an indictment insufficient to support a restraint on the alienation of a defendant's property.[10] Indeed, when property is physically seized for the purposes of civil forfeiture proceedings, a more significant intrusion than simply a restraint on alienation, there is no requirement that a pretrial probable cause hearing be held.[11]

Even assuming arguendo that a defendant whose property is subject to a restraining order has some entitlement to a hearing at which the government must show probable cause to believe that the property is forfeitable, the court below clearly erred in holding that such a hearing must be conducted in accordance with the Federal Rules of Evidence. In *Gerstein* v. *Pugh*, *supra*, this Court held that a hearing on the issue of probable cause is necessary if an arrest is based on a prosecutor's information, rather than an indictment.

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[10] Because the district court is empowered under 21 U.S.C. 848(d) to issue restraining orders only when "proper," it may be that a defendant should be free to petition the district court to lift the restraining order if he can shoulder the burden of coming forward with evidence that the restrained property is not part of the profits of the illegal enterprise and hence not forfeitable. In the absence of such a showing by the defendant, however, the indictment should be treated as satisfying the government's burden to show probable cause.

[11] Some of the personal property named in the indictment here was seized and civil forfeiture proceedings instituted. Those proceedings were dismissed, however, because the district court refused to stay discovery pending disposition of the criminal case, and satisfying respondents' discovery requests would have jeopardized the safety of government witnesses. Pursuant to an order of the district court (App. E, *infra*, 26a-28a), these seizures were "adopted" in the criminal forfeiture proceeding and the seized property was retained by the government.

The Court rejected, however, the view that this hearing had to afford the full panoply of adversary safeguards, explaining that the issue of probable cause in connection with an arrest warrant traditionally has been reliably determined in a nonadversary proceeding on the basis of hearsay. 420 U.S. at 119-122. By the same token, a restraining order hearing, if necessary at all, can be reliably conducted if hearsay is admitted; any perceived deficiency in the probable cause determination of the grand jury is surely cured by holding a further hearing before a judicial officer at which the defendant has an opportunity to participate similar to that in a traditional preliminary hearing.[12]

c. Because the government has only recently begun to emphasize the forfeiture remedy and to seek restraining orders, the lower courts have given only limited consideration to the question presented here concerning the need for a hearing to support an order restraining the alienation of forfeitable property. One other court of appeals, in *United States* v. *Long*, 654 F.2d 911, (3d Cir. 1981), has stated that some sort of hearing is required to support a restraining order, although it does not appear to have contemplated the full-fledged adversary hearing required by the Ninth Cir-

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[12] The Federal Rules of Evidence do not require that hearsay evidence be barred at a restraining order hearing. But see *United States* v. *Veon*, 538 F. Supp. 237 (E.D. Cal. 1982). Rule 1101(d)(3) of the Federal Rules of Evidence provides that they do not apply to "preliminary examinations in criminal cases," where hearsay evidence customarily has been received. See Advisory Committee Note. To the extent the court of appeals' holding rests on Rule 65 of the Federal Rules of Civil Procedure, it is surely erroneous because criminal forfeitures plainly are governed by the Federal Rules of Criminal Procedure. See Fed. R. Crim. P. 7(c)(2) and 32(b)(2); see also Fed. R. Crim. P. 54(b)(5) (excluding *civil* forfeiture proceedings).

cuit.[13] Ordinarily, this might lead us to refrain from presenting the issue to this Court pending further litigation in the lower courts. Nonetheless, we believe that it would not be in the interest of sound administration of federal criminal justice to defer authoritative resolution of this issue pending further developments in the lower courts. This is an issue of great practical significance in RICO and continuing criminal enterprise forfeiture cases, which are ordinarily among the most important federal prosecutions, and both prosecutors and trial courts require guidance on how to handle the entry of restraining orders to prevent defendants from evading forfeitures.

Moreover, because the restraining order issue evaporates when the trial is held, there will be only a limited number of cases in which appellate courts that have not yet considered the issue will have the opportunity to give guidance to trial courts. In particular, it is only in an unusual case, such as the instant one with its accompanying Fourth Amendment issues, that the issue of the procedures needed to enter a restraining order will survive mootness long enough to reach the Supreme Court. Thus, if the Court fails to grant certiorari here, the effective use of criminal forfeiture provisions will be eliminated in the Ninth Circuit, and in other district courts that choose to follow the decision below, for a considerable period of time.

2. a. The court of appeals' holding that a warrantless entry into premises in the absence of exigent circum-

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[13] Indeed, the restraining order in *Long* was upheld on the basis of the hearing already held in the district court, although that court's finding of forfeitability rested on what appears to have been hearsay testimony by a government agent. See 654 F.2d at 915.

stances[14] requires suppression of evidence subsequently seized from those premises pursuant to a valid, untainted search warrant is completely inconsistent with the well-established exclusionary rule doctrine that only the "fruits" of an illegal search or seizure should be suppressed. See, e.g., *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The court below relied exclusively on *United States* v. *Allard*, 634 F.2d 1182 (9th Cir. 1980). In *Allard*, the Ninth Circuit held that evidence seized pursuant to a warrant under circumstances similar to the instant case had to be suppressed "notwithstanding any 'independent source' supporting the warrant." 634 F.2d at 1187. The court reasoned that the warrantless entry to secure the premises was an illegal seizure of the premises and all of its contents, including the evidence there, even though the officers were as yet unaware of the existence of that evidence. *Id.* at 1185-1186. Because the government had not shown that this seizure "made no practical difference," for example, by proving that the evidence would not have been moved while a warrant was being obtained, the court concluded that the evidence discovered pursuant to the warrant search should have been suppressed. *Id.* at 1187 & n.6.

It is black letter law that only the fruits of a Fourth Amendment violation are subject to suppression and that "the exclusionary rule has no application [where] the Government learned of the evidence 'from an independent source.'" *Wong Sun* v. *United States*, *supra*, 371 U.S. at 487, quoting *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920). See also

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[14] It is our view, as we argued in both the district court and the court of appeals, that the warrantless entries in this case were in fact justified by exigent circumstances. However, because that contention is relatively fact-bound, we do not renew it in this Court.

United States v. *Crews*, 445 U.S. 463, 470-471 & n.11 (1980). The decisions below and in *Allard* strike at the heart of this doctrine. There was an illegal entry in these cases, but that entry did not cause the discovery of any evidence. Rather, the suppressed evidence derived from a completely independent source—a search pursuant to a valid warrant untainted by the illegal entry.

The Ninth Circuit's attempt in *Allard* to reconcile its approach with established Fourth Amendment jurisprudence is unavailing. First, the court erred in characterizing the police action of securing premises pending the arrival of a warrant as an illegal seizure of those premises and its contents. It is appropriate for police to take action to secure premises and preserve the status quo pending the arrival of the warrant. Cf. *United States* v. *Chadwick*, 433 U.S. 1, 13-14 & n.8 (1977). If that action can be characterized as a seizure at all, it is not an illegal seizure. The illegality in *Allard* and in the instant case was the *search* that occurred when the police entered the premises; that entry allowed them to view the contents of a private area without the requisite authorization of a magistrate. But the police here did not discover any evidence during the illegal entry and consequent search; hence, the suppressed evidence was not a fruit of that entry.

In any event, even assuming that the entry and securing of the premises was properly treated as an illegal seizure of the evidence of the premises, the Fourth Amendment does not require suppression of the evidence seized pursuant to the warrant. The only possible nexus between the securing of the premises and the subsequent discovery of the evidence was that persons present on the premises would thereby be prevented from destroying or otherwise disposing of the evidence

before the warrant could be executed.[15] But the Fourth Amendment cannot possibly protect an individual's right to destroy incriminating evidence during the time it takes to obtain a warrant. To the contrary, had the agents reason to know that evidence was in danger of being destroyed before the warrant could be procured, exigent circumstances would indeed have been present and would have justified a warrantless entry to prevent such destruction. See, e.g., *United States* v. *Santana*, 427 U.S. 38, 43 (1976).

b. The decision of the court below conflicts with decisions in several other circuits. It is irreconcilable with the Second Circuit's decision in *United States* v. *Segura*, 663 F.2d 411 (1981), petition for cert. pending, No. 82-5298, which held that evidence discovered and seized pursuant to a valid search warrant was admissible even though agents had illegally entered and secured the premises pending the issuance of the warrant. In addition, the Fifth Circuit has expressly noted and rejected *Allard* in ruling that an illegal entry did not taint a subsequent warrant search. *United States* v. *Fitzharris*, 633 F.2d 416, 421 (1980), cert. denied, 451 U.S. 988 (1981). And several other courts of appeals have reached results inconsistent with the decision below, both in connection with an illegal entry to secure premises (see *United States* v. *Beck*, 662 F.2d 527, 530 (8th Cir. 1981); *United States* v. *Kinney*, 638 F.2d 941, 945 (6th Cir.), cert. denied, 452 U.S. 918 (1981); but cf. *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974) (evidence actually discovered in plain view during illegal entry held suppressible despite later warrant search)) and in other contexts

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[15] Even this theory cannot justify the suppression of evidence discovered in the Crozier residence, since no one was home when the agents entered.

(see, *e.g.*, *United States* v. *Torgersen*, No. 82-1649 (8th Cir. Oct. 20, 1982), slip op. 4-5; *United States* v. *Bosby*, 675 F.2d 1174, 1181 (11th Cir. 1982)).

Despite this weight of contrary authority, *Allard* appears to be well entrenched in the law of the Ninth Circuit. That court has twice declined to convene en banc to review the *Allard* rule, in *Allard* itself and in the instant case, and *Allard* has been cited as binding precedent with some regularity. See *United States* v. *Kunkler*, 679 F.2d 187, 189 n.1 (9th Cir. 1982); *United States* v. *Martell*, 654 F.2d 1356, 1364 (9th Cir. 1981) (Nelson, J., dissenting), petition for cert. pending, No. 81-1772; *United States* v. *Taheri*, 648 F.2d 598, 600 (9th Cir. 1981). Accordingly, unless the Court grants certiorari here, the exclusionary rule will continue to be invoked in the Ninth Circuit to suppress evidence seized pursuant to a valid warrant and untainted by any prior illegality.

3. The court of appeals plainly erred in holding that the warrant for the search of the Crozier residence violated the Fourth Amendment's specificity requirement.[16] The warrant authorized the seizure of several kinds of items, such as chemicals, laboratory equipment, notes, and formulas that were material evidence of the crime of manufacture and possession with intent to distribute amphetamine.[17] This description specifically limited the documents that could be seized to those that were evidence of a particular crime and eliminated the possibility of a fishing expedition. It therefore plainly satisfied the standards of *Andresen* v.

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[16] The court also held the less specific warrant for the search of the Stein residence to be unconstitutionally overbroad. We do not challenge that ruling here.

[17] The court of appeals' opinion contains an incomplete quotation of the materials authorized to be seized by the warrant (see App. A, *infra*, 8a). A complete quotation is set forth at note 6, *supra*.

Maryland, 427 U.S. 463, 479-482 (1976). See, e.g., *United States* v. *Smith*, 686 F.2d 234, 238 (5th Cir. 1982); *United States* v. *Cortellesso*, 601 F.2d 28, 33 (1st Cir. 1979). Indeed, it is difficult to conceive how a search warrant for documents at a suspected drug manufacturing site could be drafted with much more specificity, and the court of appeals did not suggest how the specificity of the warrant could have been improved. For this reason, the warrant description invalidated by the court of appeals is one that is standard in warrants authorizing searches for evidence of drug offenses, and the decision below, if followed, will severely limit the ability of law enforcement agents to seize, pursuant to a warrant, incriminating evidence from a known site of criminal activity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

APPENDIX A

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

CLARENCE JAY CROZIER, MANUEL ISADORE PINE, ALAN TERRY STEIN, AND FLORENCE MARGARET WOLKE, DEFENDANTS-APPELLEES.

Nos. 81-1345, 81-1355 and 81-1484.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 1, 1982.

Decided April 20, 1982.

On appeal from Orders of the United States District Court for the District of Arizona.

Before GOODWIN and TANG, *Circuit Judges*, and SOLOMON,* *Senior District Judge*.

SOLOMON, *Senior District Judge:*

These three interlocutory appeals arose out of a criminal case against Crozier, Pine, Stein, Wolke, and seven other defendants who were charged with the manufacture and possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). They were also charged with conspiracy and tax evasion, in violation of 26 U.S.C. § 7201. Count Two of the indict-

* Hon. Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

ment charges Crozier with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 (1976)[1] (Section 848).

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[1] Section 848 provides:

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or

The penalties for violating Section 848 include forfeiture of all profits obtained through the criminal enterprise. The government moved *ex parte* to restrain the sale, transfer, or encumbrance of virtually all of Crozier's real and personal property, and some property belonging to Florence Wolke, who occupies the same house with Crozier, but who is not named in Count Two. The district court granted the government's request for a restraining order.

The motions of Crozier and Wolke to dissolve the restraining order were denied without a hearing. They filed interlocutory appeals,[2] in which they contend that: (1) Section 848(d) is unconstitutional, particularly as applied in this case, and (2) the Court of Appeals has jurisdiction to decide an interlocutory appeal from the district court's refusal to dissolve the restraining order issued under Section 848(d).

In the district court, Crozier, Pine, Stein and Wolke moved to suppress certain items of physical evidence. After a hearing, the district court suppressed the evidence obtained as a result of the following searches:

1. The warrantless entry into the residence of Crozier and Wolke, and the subsequent execution of a search warrant for their residence, all on April 9, 1980.

2. The warrantless entry into the residence of Stein, and the subsequent execution of a search warrant for that residence, all on April 9, 1980.

3. The warrantless seizure and the warrantless search of a 1980 Cadillac El Dorado, on April 10, 1980.

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prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

Pub. L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265.

[2] Crozier also filed a petition in bankruptcy to prevent the foreclosure of his real property pending the outcome of this appeal. The district court held him in contempt for this action.

4. The execution of a second search warrant for the residence of Stein on April 11, 1980.

Although the district court did not rule on the validity of the El Dorado seizure, the government concedes that the seizure was the fruit of the April 9 search warrant for the Stein residence.

The government appeals from the district court's order which (1) suppressed the fruits of the search of the residence of Crozier and Wolke on April 9, (2) suppressed chemicals and laboratory apparatus seized from the residence of Stein on April 9, and (3) failed to limit suppression to those defendants who had shown a reasonable expectation of privacy in the areas searched.

The government does not appeal from the order which suppressed the documents and papers seized at the residence of Stein on either April 9 or April 11, 1980.

I.

JURISDICTION

As a general rule interlocutory appeals are not permitted, but there are exceptions. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949), the Supreme Court granted review of "collateral orders" affecting rights independent of the merits of the action which were too important to be denied prompt review. The issue was whether a state statute requiring plaintiff's shareholder to post security for litigation costs applied in federal courts. In *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), the Supreme Court, in granting interlocutory review of a double jeopardy challenge, extended *Cohen* to criminal cases.

In this case, without a hearing either before or after the court issued its restraining order under Section 848(d), Crozier and Wolke were restrained from selling

or transferring their interest in real property which they jointly own, and from possessing, selling, or transferring a large amount of jewelry and other personal property in which one or both of them have an interest. This restraint will continue until they are tried and a jury returns its verdicts.

Until that time, the government will not be required to show that any of this property was acquired with illicit profits or to show who owns the property as between Crozier and Wolke. This is particularly important here because Wolke is not named in Count Two, the count that charges a violation of Section 848, and her property may not be subject to forfeiture.

A crucial issue is whether the defendants' rights may be irreparably lost or impaired if an interlocutory appeal is denied. Crozier and Wolke assert that as a result of the restraining order and the seizure of their property, their financial condition has worsened; they have been unable to prevent the foreclosure of one parcel of jointly held property, and they have no income to pay living or litigation expenses. They also assert that their property has been seized and restrained without a hearing on the propriety of the seizure. Unless an interlocutory appeal is granted, their due process challenge to the order will become moot after the jury returns a verdict. As a result, the constitutional question will evade review.

We agree. The rights of Crozier and Wolke may be irreparably lost or impaired if the appeal is denied. The disputed issues—the propriety of the issuance of the restraining order and which property, if any, is subject to forfeiture—are collateral to and separate from their guilt or innocence.

One reason for the policy against interlocutory review is excessive delay. It is likely that an appeal may be used as a dilatory tactic because ordinarily the trial

court loses its power to proceed once a party files a notice of appeal. *United States v. Burt*, 619 F.2d 831, 838 (9th Cir. 1980).

Here, however, the resolution of the issues raised in the appeal is collateral to and has no bearing on the outcome of the criminal trial. Under these circumstances a district court may retain jurisdiction during the interlocutory appeal and proceed with the criminal trial. *See United States v. Leppo*, 634 F.2d 101, 105 (3rd Cir. 1980).

We hold that this court has jurisdiction to hear the interlocutory appeal, and the district court retains jurisdiction to proceed with the trial.

II.

VALIDITY OF THE RESTRAINING ORDER

Crozier and Wolke assert that Section 848(d) fails to provide for notice and hearing either before or after the seizure of property or the entry of a restraining order affecting the property. They therefore contend that, even if no loss results from the restraining order, they will be unable to sell or encumber their property until the case is concluded.

The government contends that the due process constitutional safeguards that accompany seizure of property in civil cases do not apply to criminal cases because a seizure under Section 848 must be initiated by a grand jury. The government also asserts that in a forfeiture case the notice and hearing requirements do not apply when the government seizes the property.

A grand jury determination is not an adequate substitute for an adversary proceeding because a defendant has no opportunity to cross-examine witnesses and the government does not assume the burden of proof. The prohibition against taking property without due

process of law applies equally to sanctions administered under the authority of both criminal and civil statutes.

Even when exigent circumstances permit an *ex parte* restraining order, the government may not wait until trial to produce adequate grounds for forfeiture. *See Ivers v. United States*, 581 F.2d 1362, 1368 (9th Cir. 1978). Here, the property of both Crozier and Wolke has already been restrained for more than a year, and the criminal trial may be many months away. If they are acquitted, they will have been unjustly deprived of their property for more than two years, with no remedy for their loss.

Section 848(d) authorizes the district court to enter such restraining orders as it deems proper. The section does not specify requirements for determining when a restraining order should issue. In the absence of specific language to the contrary, the district court must apply the standards of Rule 65 of the Federal Rules of Civil Procedure, which requires an immediate hearing whenever a temporary restraining order has been granted *ex parte*.

In *United States v. Long*, 654 F.2d 911 (3rd Cir. 1981), the district court enjoined the transfer of an airplane which the defendant had allegedly purchased with the proceeds of illicit drug sales. The government obtained an *ex parte* restraining order under Section 848(d) and shortly thereafter a hearing was held, at which the district court found that the airplane was subject to forfeiture. The appellate court affirmed the district court's denial of the motion to dissolve the restraining order and in holding that the district court had satisfied constitutional requirements, stated:

> Before a court can issue such a restraining order, however, the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the Continuing Criminal Enterprise statute and two, that the profits or properties

> at issue are subject to forfeiture under the provisions of section 848(a)(2). *See* 21 U.S.C. § 848(d) .... In addition, these determinations must be made on the basis of a full hearing; the government cannot rely on indictments alone.

Id. at 915.

We hold that the district court erred in denying the motions of Crozier and Wolke to dissolve the restraining order without a hearing. We therefore remand to the district court with directions to hold an appropriate hearing.

III.

SUPPRESSION OF EVIDENCE FROM CROZIER RESIDENCE

The search warrant for the residence of Crozier and Wolke authorized the seizure of "amphetamine, precursor chemicals, including methylamine, P-2-P, ether and alcohol, and laboratory apparatus, notes, formulas, as well as any indicia of ownership and control of the premises." The warrant did not specify what notes, formulas, documents, or physical evidence should be seized, or what evidence would indicate ownership and control. Before the warrant was issued, the agents were directed to "secure the premises" while other agents obtained the warrant. Although the agents were not expected to enter the premises, they did enter and remain on the premises for approximately six hours before the search warrant arrived. During that time they looked in every room.

The district court held that the agents had no probable cause to believe that any controlled substance would be located within the residence, that no exigent circumstances existed to justify entry without a warrant, and that the agents had effectively seized the premises and its contents when they entered and examined the premises before the warrant arrived. The district court sup-

pressed the evidence on the authority of *United States v. Allard*, 634 F.2d 1182 (9th Cir. 1981), a case holding that the seizure of a hotel room pending procurement of a warrant could not be justified without showing exigent circumstances.

The government contends that the search warrant was sufficiently specific, because it enabled the officers "to reasonably ascertain and identify the place to be searched and the objects to be seized." *United States v. Coppage*, 635 F.2d 683, 686-7 (8th Cir. 1980).

The cases on which the government relies all involved search warrants which were narrowly drawn. They set out the type and contents of the documents to be seized. In *United States v. Federbush*, 635 F.2d 246, 251 (9th Cir. 1980), the warrant authorized seizure of documents "pertaining to Windward International Bank, Ltd." In *United States v. Louderman*, 576 F.2d 1383, 1389 (9th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 257, 58 L.Ed.2d 243 (1978), the warrant specified documents and records pertaining to specific individuals and occurrences.

Here, the warrant allowed the agents wide discretion, and they seized many irrelevant papers.

The government contends that exigent circumstances justified entry into the premises before obtaining a search warrant because there was danger that the evidence would be destroyed. Even if there was evidence of drug trafficking at the Crozier residence, the district court found that there were no exigent circumstances. A "search cannot be justified solely because an agent knows that there is contraband on the premises." *United States v. Allard*, 600 F.2d 1301, 1304 (9th Cir. 1979). Here, the agents did not know whether anyone was in the house when they entered; they made no arrests until after the warrant arrived.

Evidence illegally seized before the search warrant was obtained may be suppressed. *United States v.*

Allard, 634 F.2d 1182, 1187 (9th Cir. 1980). The government then has the burden to show that it would have independently discovered and obtained the evidence even if it had not been illegally seized. *Id.* The government made no such showing.

The district court's finding that there were no exigent circumstances was not clearly erroneous, *United States v. Flickinger*, 573 F.2d 1349, 1357 (9th Cir. 1978), and the order to suppress the evidence seized from the Crozier residence is affirmed.

IV.

SUPPRESSION OF EVIDENCE FROM STEIN RESIDENCE

The Stein residence was searched twice; on April 9, 1980, and again on April 11, 1980. On April 9, after Crozier and Stein were arrested, government agents entered Stein's residence without a warrant and secured the premises for more than six hours before the search warrant arrived. The warrant did not describe any particular property. It merely authorized the seizure of "material evidence of violation of 28 U.S.C. § 841, 846. Manufacture and possession with intent to distribute amphetamine and conspiracy." The affidavit in support of the warrant was much more detailed. However, the district court concluded that the search was not limited to the affidavit, and that the warrant allowed the agents unbridled discretion.

During the April 9 search, the agents photographed jewelry within the residence, and then obtained a warrant to seize the jewelry. They seized it on April 11. The district court suppressed all evidence seized in both searches.

The Fourth Amendment prohibits general searches. Nothing may be left to the discretion of the officer executing the warrant. *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627

(1976). We hold that the warrant which authorized the search of the Stein residence was overbroad.

The government explains its warrantless entry into the Stein residence by citing the same facts used to justify its illegal entry into the Crozier residence. No one was home when the agents entered the Stein residence. In our view, there was less justification to enter the Stein residence than there was to enter the Crozier residence. The finding that there were no exigent circumstances is not clearly erroneous. The order to suppress evidence seized from the Stein residence is affirmed.

V.

STANDING

The district court suppressed all the evidence seized from the Stein residence and from the Crozier residence, not only against Stein and Crozier, but also against all of the defendants.

At the hearing, the defendants contended that each had a reasonable expectation of privacy in the residence of the other, because they would often spend days in each other's company, and often left possessions at either residence. The government concedes that Wolke lives in the Crozier residence, but denies defendants' other allegations.

Under *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), defendants charged with possessory offenses no longer have automatic standing to assert a Fourth Amendment violation. To challenge the admission of evidence, each defendant must demonstrate a "legitimate expectation of privacy" in the area searched. *Id.* at 92, 100 S.Ct. at 2553. We remand this issue to the district court for new findings in light of *Salvucci*.

The district court did not reach the question of the probative value of the evidence and whether it is admissible under Rule 403 of the Federal Rules of Evidence.

See United States v. Figueroa, 618 F.2d 934, 942-43 (2nd Cir. 1980). We therefore express no opinion on its admissibility.

CONCLUSION

The restraining order is vacated, and the district court is directed to hold an appropriate hearing.

The district court's orders suppressing evidence illegally seized are affirmed, except that the evidence seized in either residence is not suppressed for non-resident defendants. The question of what evidence may be admitted against non-resident defendants is remanded to the district court for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-1345, 81-1355 and
81-1484

[Filed Aug. 17, 1982]

UNITED STATES OF AMERICA, APPELLANT,

v.

CLARENCE JAY CROZIER, MANUEL ISADORE PINE, ALAN TERRY STEIN, AND FLORENCE MARGARET WOLKE, APPELLEES

ORDER

Before: GOODWIN AND TANG, *Circuit Judges*, and SOLOMON*, *District Judge*

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The active judges were advised of the suggestion for rehearing en banc and no judge requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR81-19 PHX VAC

UNITED STATES OF AMERICA, PLAINTIFF,

v.

CLARENCE J. CROZIER, ET AL, DEFENDANTS.

[Filed July 9, 1981]

ORDER RE: MOTIONS TO SUPPRESS

The Court having had under advisement the motions to suppress of the defendants CLARENCE J. CROZIER, MANUEL I. PINE, ALLEN TERRY STEIN and FLORENCE MARGARET WOLKE, and the Court having duly considered the memoranda attached thereto, the evidence presented in support thereof and the opposition thereto, and the post hearing memoranda, the Court finds that the motions to suppress pertain to the search and seizure of the following: (1) the home ranch; (2) the 1980 Oldsmobile Toronado vehicle; (3) the 1978 Ford vehicle and 14 pieces of luggage; (4) the Crozier residence located at 12498 Avenue C., Yuma, Arizona; and (5) the Stein residence located at 5417 Francis Street, Yuma, Arizona (searches of April 9, 1980 and April 11, 1980).

THE HOME RANCH:

The Court finds that the affidavit in support of the search warrant for the home ranch was sufficient under the law to establish probable cause for the issuance thereof and that the search thereof was reasonable and pursuant to the warrant.

. . .

IT IS THEREFORE ORDERED denying the motions of the defendants to suppress as to the evidence obtained and seized at the home ranch.

THE 1980 OLDSMOBILE TORONADO VEHICLE:

The defendant Allen Terry Stein was arrested about two miles inside the California border in his 1980 Oldsmobile Toronado. No arrest warrant had been previously secured. The Court finds that the arrest took place after the discovery of the clandestine laboratory of the home ranch. The search of the 1980 Oldsmobile Toronado was lawful in that there was probable cause to believe that the vehicle contained contraband, fruits or instrumentalities of a crime, especially where it was stopped on the open highway, and the other facts which the officers had within their knowledge.

A search warrant was issued subsequent to the arrest of the defendant Stein which authorized a search of the vehicle and all luggage contained therein. The obtaining of the search warrant for the luggage in the vehicle was what is Constitutionally required. The issuance of the search warrant and the execution thereof was reasonable and pursuant to law.

IT IS THEREFORE ORDERED denying the motions to suppress in respect to the search and seizure of the evidence contained in the 1980 Oldsmobile Toronado vehicle.

THE 1978 FORD VEHICLE AND 14 PIECES OF LUGGAGE:

All that is necessary to search a vehicle on the highway is probable cause. However, regarding containers such as luggage, such items can only be searched after a search warrant is obtained, absent exigent circumstances. The Court does not find that the courts have distinguished searches of car interiors from locked

glove compartments and trunks where the search is premised on the automobile exception. This, of course, is subject to the necessity of obtaining a search warrant for the luggage. The Court finds the Government has a right to remove the vehicle to a police station or to a place of safety to avoid endangering the safety of the agents or passengers from passing traffic. The 14 containers (luggage) were searched only after a search warrant therefor had been obtained.

The question was raised by the defendants that the search warrant for the 14 pieces of luggage was authorizing only a daytime search and that it was contrary to Rule 41(c)(1), Federal Rules of Criminal Procedure. However, in respect to controlled substances, search warrants are issued pursuant to 21 U.S.C. § 879(a) which provides as follows:

> "A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time."

It is evident that § 879(a) does not require a specific showing for a nighttime search other than contraband is likely to be on the property or the person to be searched at that time. The Court has considered whether the non-fundamental violation of Rule 41 required suppression where there is no prejudice to the defendant and where there is no evidence establishing or indicating bad faith or deliberate disregard of the rule. The appropriate inquiry when determining whether the exclusionary rule should be applied in particular circumstances is to decide whether unlawful police conduct would be sufficiently deterred by exclusion, to outweigh any detrimental effects of excluding the evidence. The 14 pieces of luggage were already in the possession of the officer when the warrant was obtained

and this "nonfundamental violation" not demonstrating prejudice by the tardy execution of the warrant is not sufficient to warrant the exclusion since the search under such circumstances is reasonable within the contemplation of the law.

IT IS THEREFORE ORDERED denying the motions to suppress evidence obtained from the 1978 Ford vehicle and the 14 pieces of luggage.

THE CROZIER RESIDENCE—12498 AVENUE C., YUMA, ARIZONA:

The search warrant for these premises is objected to by the defendants in that the description of items was too general and the agents unlawfully seized items outside the warrant. The warrant in particular described the matters to be seized as "amphetamine, precursor chemicals, including methylamine, P-2-P, ether and alcohol, and laboratory apparatus, *notes*, formulas, as well as any indicia of ownership and control of the premises." The search warrant does not state what notes or formulas, nor does it indicate guidelines for the type of documents or physical evidence which constitute indicia of ownership or control of the premises. Further, in respect to the search and seizure of physical evidence at the Crozier residence, the evidence indicates that when the agents went to obtain the warrant they directed other agents to secure the premises but the entry therein had not been directed or expected by the agents giving the order. The agents had no facts that would give them probable cause to believe that methamphetamine or any other controlled substance would be located within the residence. The Court therefore concludes that no exigent circumstances existed to justify the entry by the agents into the premises without a warrant.

Further, after the officers arrived to effect entry into the premises, they were on the premises for approxi-

mately 6 hours prior to the search warrant arrival. During that time they looked in every room in order to "secure the premises" and under these circumstances they had effectively seized the premises and the contents thereof. U.S. v. Allard, 634 F.2d 1182 (9th Cir. 1981).

Since the Court concludes that the warrant was overbroad and the execution thereof constitutes an unreasonable search and seizure under the law.

IT IS ORDERED granting the motion to suppress the evidence obtained at the Crozier residence located at 12498 Avenue C., Yuma, Arizona.

THE STEIN RESIDENCE—5417 FRANCIS STREET, YUMA, ARIZONA

There were two searches of the Stein residence; the first was April 9, 1980 and the second was April 11, 1980. After the arrest of the defendants Crozier and Stein, Agent Murphy directed other agents to proceed to this address and secure the premises, obstensibly [sic] to prevent the destruction or disposal of evidence being applied for in the warrant.

A warrantless entry was made into the Stein residence on April 9, 1980 and the premises were secured at least for 6 hours before the search warrant arrived. It is axiomatic that, in general, entry by law enforcement officers into a private residence without a warrant and without consent constitutes an unlawful intrusion. *Schmerber v. California*, 384 U.S. 757 (1966). The warrant of April 9, 1980 is different than the warrant for the Crozier residence. The search warrant for the Stein residence did not describe any property whatsoever and was merely a description in very general terms, as follows:

> "Material evidence of violation of 28 U.S.C. § 841, 846. Manufacture and possession with intent to distribute amphetamine and conspiracy."

The affidavit in support of the warrant does describe with particularity certain personal items, such as gold colored coins, diamonds, emeralds, numerous rings, necklaces, et cetera, as well as books and records of financial transactions.

It is clear that the affidavit may set forth many items of property, contraband, records and documents, and that the Magistrate in his discretion may exclude items. The Court concludes that the search must be pursuant to the warrant and not necessarily pursuant to the affidavit. The warrant does not describe anything to be seized nor does it indicate that the Magistrate exercised his law given discretion in directing the agents regarding the property to be seized. A warrant merely describing "material evidence under 21 U.S.C. § 841,846 clearly leaves to the agent the unbridled discretion to seize whatever he determines is evidence in the case. Were the Court to sanction such a general warrant it would be the sanctioning of the proposition that the property to be seized need not be described with particularity and that the agent can take whatever he decides is evidence of the offense. The Court concludes that the law is to the contrary.

Further, in the search of the Stein residence, the execution thereof was so overbroad as to constitute a general search, and again as in the search of the Crozier residence, the agents effectively seized the premises and the contents thereof contrary to *U.S. v. Allard, supra*.

Subsequent to the initial search of April 9, 1980, the agents again searched the Stein residence on April 11, 1980. On the April 9th search, they photographed jewelry within the residence and then obtained the warrant in respect thereto. Since the Court has found the search of the Stein residence unreasonable and contrary to law, the Court now finds that the seizure of April 11,

1980 were the fruits of the poisonous tree which stemmed from the illegal search of April 9, 1980.

IT IS THEREFORE ORDERED granting the motions to suppress the evidence obtained from the Stein residence located at 5417 Francis Street, Yuma, Arizona, on April 9, 1980 and April 11, 1980.

Dated this 9th day of July, 198[1].

/s/ VALDEMAR A. CORDOVA

VALDEMAR A. CORDOVA
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

NO. CR-81-019-PHX-VAC

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE JAY CROZIER, A/K/A C. J. CROZIER, ET AL, DEFENDANTS.

[Filed Jan. 16, 1981]

ORDER

This matter having come on motion of the United States of America for a restraining order and establishment of a performance bond pursuant to Section 848 (a) and (d) of Title 21, United States Code, which provides for jurisdiction to enter restraining orders and take such other actions including the acceptance of satisfactory performance bonds in connection with any property or other interest subject to forfeiture pursuant to Section 848 (a)(2) of Title 21, United States Code; Section 1651 of Title 28, United States Code; and this Court's inherent power to make orders necessary and proper to the orderly carrying on of litigation brought within the Court's jurisdiction;

This Court finds that, if this Court fails to enter this order as prayed for by the United States, that upon Clarence Jay Crozier learning that the property listed below is subject to forfeiture upon conviction on Count II, that Clarence Jay Crozier, a/k/a C. J. Crozier, or his agents, servants, employees, attorneys, family and those persons in active concert or participation with him might sell, alienate, encumber, transfer, or otherwise place the property beyond the jurisdiction of this Court or detrimentally affect the Government's interest

in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States by defeating such forfeiture.

IT IS HEREBY ORDERED that Clarence Jay Crozier, a/k/a C. J. Crozier; Florence Margaret Wolke, a/k/a Florence Crozier; Alan Terry Stein; Susan D. Stein; John Richard Crozier; their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby enjoined and restrained from selling, assigning, pledging, distributing, giving away, encumbering, or otherwise disposing of, or removing from its present location, with the intent to conceal and hide from the jurisdiction of this Court or removing from any checking or savings account, all or part of their interest, direct or indirect, in the property listed below, real, personal, or choses in action, without prior approval of the Court upon notice to the United States and an opportunity for the United States to be heard, except as specified in this Order.

IT IS FURTHER ORDERED that the property which shall be subject to this Order shall include the following, which is all subject to forfeiture upon conviction on Count II of the captioned indictment, such property allegedly being profits obtained by Clarence Jay Crozier, a/k/a C. J. Crozier, in the charged enterprise and/or property affording a source of influence over such enterprise:

1. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as 12498 Avenue C, Yuma, Arizona, together with approximately 35 acres adjacent thereto:

2. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as 1912 West 18 Place, Yuma, Arizona;

3. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, comprised of

approximately 228 acres in Mora County, New Mexico, purchased by Clarence Jay Crozier in March, 1980 from Jerry Hooper, further described in the copy of the warrenty deed attached hereto as Exhibit "B";

4. Various articles of jewelry, coins and related articles seized on April 9 and 10, 1980 from a 1978 Ford LTD, Arizona license WKX-310, and from a 1980 Cadillac El Dorado, Arizona license WHK-345, which items are at present in the custody of the United States Marshal's Service pursuant to seizure, pursuant to Civil Case No. 80-512-PH-CLH;

5. A 1979 Ford Bronco, California license number 185ZUR;

6. A 1979 Oldsmobile Toronado, California license number 598-XGB;

7. A 1980 GMC pickup truck, Arizona license number 3AX-725;

8. A 1978 Ford LTD, Arizona license number WKX-310;

9. A 1980 Cadillac El Dorado, Arizona license number WHK-345;

10. Tractor, plow, disc equipment and other farm equipment purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

11. A 1979 Chevrolet Caprice, California license number 277-UAB;

12. One hay hauler, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a/ C. J. Crozier;

13. One white trailer and hitch, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

14. One horse trailer, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or oth-

erwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

15. One white and green travel home, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

16. One boat, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

17. Laboratory apparatus, chemicals, and related items seized on April 9, 1980 from the guest house at the property known as Home Ranch, Inc., having the mailing address of Route 1, Box 120, Wellton, Arizona;

18. Any and all other real or personal property, wherever located, obtained or controlled by Clarence Jay Crozier, a/k/a C. J. Crozier, subject to forfeiture pursuant to the provisions of Section 848 (a)(2) of Title 21, United States Code, including, but not limited to currency, and banking and savings accounts obtained or controlled by Clarence Jay Crozier, a/k/a C. J. Crozier.

IT IS FURTHER ORDERED that prior approval of the Court is unnecessary only if it is necessary to use the property, real, personal, or choses in action, to pay for normal and average living expenses for Clarence Jay Crozier, a/k/a C. J. Crozier, and any lawful dependents supported by Clarence Jay Crozier, a/k/a C. J. Crozier, on the date of the entry of this Order, including food, clothing, normal and average household expenses, medical care, utilities, normal and average expenditures for the upkeep of vehicles, and normal and average expenses for the care of animals located on the property known as 12498 Avenue C, Yuma, Arizona, and the adjacent fifteen acres purchased by Clarence Jay Crozier, a/k/a C. J. Crozier, on or about February 14, 1979. Any expenses or expenditures in doubt should first be approved by the Court.

The Court will hear from the Government and from the defending party as soon as possible at a date to be set by the Court, on the question of the establishment of a performance bond as prayed for in the Government's Motion.

SO ORDERED this 16th day of January, 1981.

/s/ VALDEMAR A. CORDOVA

VALDEMAR A. CORDOVA
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CR-81-019-PHX-VAC

Filed March 18, 1981

UNITED STATES OF AMERICA, PLAINTIFF,

v.

CLARENCE J. CROZIER, ET AL., DEFENDANTS.

ORDER

This Court having considered the Government's Motion to Adopt Seizures and Supplement and Addend Restraining Order filed on March 11, 1981, this Court finds that there is probable cause to believe that Clarence J. Crozier may have an interest in the real property commonly known as Lot #20, Valley Citrus Estates, Yuma, Arizona, and 2490 Yowell Court, Unit #28, Yuma, Arizona, which interest may be subject to forfeiture under Court II of the indictment in the captioned case.

This Court finds that, if this Court fails to enter this order as prayed for by the United States, that upon Clarence J. Crozier learning that the property listed below is subject to forfeiture upon conviction on Count II, that Clarence J. Crozier, also known as C. J. Crozier, or his agents, servants, employees, attorneys, family, and those persons in active concert or participation with him might sell, alienate, encumber, transfer, or otherwise place the property beyond the jurisdiction of this Court or detrimentally affect the Government's interest in such property, thereby frustrating the ends

of justice and causing irreparable harm to the United States by defeating such forfeiture.

IT IS HEREBY ORDERED that Clarence J. Crozier, also known as C. J. Crozier; Florence Margaret Wolke, also known as Florence Crozier; Alan Terry Stein; Susan D. Stein; John Richard Crozier; their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby enjoined and restrained from selling, assigning, pledging, distributing, giving away, encumbering, or otherwise disposing of, or removing from its present location, with the intent to conceal and hide from the jurisdiction of this Court or removing from any checking or savings account, all or part of their interest, direct or indirect, in the real property listed below, real, personal, or choses in action, without prior approval of the Court upon notice to the United States and an opportunity for the United States to be heard, except as specified in this Court's previous order of January 16, 1981:

1. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as Lot #20, Valley Citrus Estates, Yuma, Arizona.

2. The real property, with all fixtures, furnishings and appurtenances, known as 2490 Yowell Court, Unit #28, Yuma, Arizona.

IT IS FURTHER ORDERED that the seizure of the real and personal property listed below be adopted from the civil actions previously filed by the United States (CIV-80-510-PHX, CIV-80-511-PHX and CIV-80-512-PHX) to the captioned case and that the United States Marshal's Service retain, as seized property on behalf of the United States, such real and personal property listed below pending outcome of the litigation on the instant indictment:

1. One 1980 Cadillac El Dorado, Arizona license #WHX-345, VIN #6L57NAE608456 (CIV-80-510-PHX);

2. One 1980 CMC ¾-ton pickup truck, Arizona license #3AX-725, VIN #TKL24AJ500440 (CIV-80-511-PHX);

3. One 1979 Ford Bronco, California license #185-ZUR, VIN #U15SLFC5304, its tools and appurtenances (CIV-80-512-PHX);

4. One 1979 Oldsmobile Toronado, California license #598-XGB, VIN #3Z57N9E124892, its tools and appurtenances (CIV-80-512-PHX);

5. Real property known as 12498 Avenue C, Yuma, Arizona, more particularly described as Parcels 7, 8 and 10 of the northeast quarter of Map 13, Book 103, Yuma County, Arizona;

6. Real property known as 1912 West 18th Place, Yuma, Arizona, more particularly described as Parcel 8, Map 24, Book 109, Yuma County, Arizona;

7. Real property comprised of twenty acres of farmland, more particularly described as Parcels 9, 13, 14 and 15 in the northeast quarter of Map 13, Book 103, Yuma County, Arizona;

8. Real property known as one unimproved Lot #20 of the Valley Citrus Estates, further described in Book 5 of Plots, page 108, Yuma County, Arizona;

9. Real property known as 1490 Yowell Court, Unit #28, Yuma, Arizona, more particularly described as Parcel 028, Map 84, Book 110, Yuma County, Arizona.

Dated this 18th day of March, 1981.

/s/ VALDEMAR A. CORDOVA

VALDEMAR A. CORDOVA
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
MAY 13, 1981

No. CR 81-019 PHX VAC

UNITED STATES OF AMERICA, PLAINTIFF,

v.

CLARENCE JAY CROZIER, DEFENDANT.

This matter having been under advisement,

IT IS ORDERED denying Defendant Clarence Jay Crozier's Motion for Dissolution of Restraining Order and/or Amendment Thereof; said motion is joined in by defendant Florence Margaret Wolke.

/s/ VALDEMAR A. CORDOVA
VALDEMAR A. CORDOVA
United States District Judge

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

OPPOSITION ON BEHALF OF RESPONDENT FLORENCE MARGARET WOLKE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I

WHETHER THE LOWER COURT CORRECTLY DETERMINED THAT THE GOVERNMENT VIOLATED FLORENCE MARGARET WOLKE'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WHEN IT OBTAINED A PRETRIAL EX PARTE RESTRAINING ORDER AGAINST HER UNDER TITLE 21 UNITED STATES CODE §848, THEREBY SEIZING ALL OF HER PROPERTY PRIOR TO TRIAL ON THE BASIS OF AN INDICTMENT ALONE, WITHOUT EVER AFFORDING HER AN EVIDENTIARY HEARING AND EVEN THOUGH SHE WAS NOT CHARGED WITH A VIOLATION OF SUCH STATUTE.

II

WHETHER THE LOWER COURT'S SUPPRESSION OF EVIDENCE WAS PROPER WHEN IT DETERMINED THAT POLICE ILLEGALLY ENTERED AND SEARCHED FLORENCE MARGARET WOLKE'S HOME IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, AND CONTINUED TO ILLEGALLY SIEZE IT FOR SIX HOURS PRIOR TO THE ARRIVAL OF A SEARCH WARRANT.

III

WHETHER THE LOWER COURT PROPERLY SUPPRESSED EVIDENCE AFTER IT DETERMINED THAT THE GOVERNMENT'S SEARCH AND SEIZURE OF VIRTUALLY ALL OF FLORENCE MARGARET WOLKE'S PERSONAL PAPERS WAS UNREASONABLE PURSUANT TO A BROAD SWEEPING WARRANT AUTHORIZING THE SEIZURE OF "NOTES" AND "INDICIA OF OWNERSHIP" WHICH FAILED TO DELINEATE ANY GUIDELINES OF PARTICULARITY WHATSOEVER.

PARTIES TO THE PROCEEDING

In addition to the named parties, Manuel Isadore Pine and Alan Terry Stein were defendants in the district court and are respondents here.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

OPPOSITION TO THE PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent, FLORENCE MARGARET WOLKE, by and through counsel undersigned, hereby enters her opposition to the government's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982). It is also Appendix A of the government's petition.

JURISDICTION

The respondent adopts the jurisdictional statement of the government's petition (Petition 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondent adopts the Statutory Provision cited by the government in its petition (Petition 2). In addition, the Fourth and Fifth Amendments to the United States Constitution are involved:

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added)

STATEMENT

This case centers around an alleged complex drug conspiracy to manufacture and distribute methamphetamine. On January 14, 1981, Florence Margaret Wolke was indicted, along with Clarence J. Crozier and nine codefendants, for conspiracy to manufacture and possess methamphetamine together with the substantive counts thereof, in violation of Title 21 United States Code §846, §841(a)(1), and Title 18 United States Code §1952. The same indictment charges Mr. Crozier, but not Ms. Wolke, with engaging in a continuing criminal enterprise in violation of Title 21 United States Code §848.

I. Restraining Orders.

A. Procedural Background:

In April, 1980 the government filed criminal charges against Clarence J. Crozier and others. 1/ On June 25, 1980, the government obtained an order dismissing those charges.

1/ This case arose out of same facts as the present criminal case and was numbered: CR-82-082-Phx-WEC. However, Ms. Wolke was not a defendant in that case.

On the following day, June 26, 1980, it brought a civil forfeiture action against Crozier pursuant to Title 21 United States Code §881.[2/] Though Ms. Wolke was not a party to any proceeding, virtually all of both Mr. Crozier's and Ms. Wolke's personal and real property was seized. On January 14, 1981, while the civil action was pending, Ms. Wolke and Mr. Crozier were indicted. On March 23, 1981, the civil action was ultimately dismissed by the Honorable Charles L. Hardy due to the government's failure to comply with Mr. Crozier's civil discovery requests. (Appendix A, pp. 29-30).

However, on January 15, 1981, while the civil forfeiture action was still pending before Judge Hardy, the government obtained an ex parte restraining order from the Honorable Valdemar A. Cordova, which covered much of the same property seized under the civil forfeiture action, together with some additional property. (Appendix B, pp. 31-35). On March 12, 1981, the government obtained a second ex parte restraining order encompassing almost all of the property already included in both the civil action and the first criminal restraining order, and adding more property. (Appendix C, pp. 36-38). All motions by Ms. Wolke and Mr. Crozier to reconsider the court's ex parte orders and to release some of the property were denied by the district court. On May 13, 1981, the district court denied Mr. Crozier's motion, joined in by Ms. Wolke, to dissolve and/or amend the restraining order. (Appendix D, p. 39). Finally, on May 21, 1981, Ms. Wolke and Mr. Crozier were forced to file bankruptcy proceedings in federal bankruptcy court in order to prevent foreclosure on their home and to salvage their other property as well. Subsequently, the government filedan order to show cause why they should not be held in contempt of court for this action, which was dismissed by the Ninth Circuit on July 23, 1981. (Appendix E, p. 40).

After an interlocutory appeal by Ms. Wolke and Mr. Crozier, the Court of Appeals reversed the district court's ruling. The restraining order was vacated and the case was re-

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2/ This forfeiture case was numbered CIV-80-512-Phx. CLH.

manded to the district court for an evidentiary hearing. See United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982). A Rehearing and Rehearing En Banc was denied and the government's petition for a writ of certiorari followed.

B. Factual Background:

For over two years virtually all of Ms. Wolke's property has been under the government's continual seizure, for the most part accomplished through ex parte restraining orders obtained without any hearing whatsoever, either before or after the orders were granted. Indeed, the government has never supplied any nexus of proof to substantiate its conclusory allegations that Ms. Wolke's personal and real property is subject to forfeiture in connection with a count in the indictment with which she is not even charged.

Specifically, the restraining orders at issue enjoin, prohibit and restrain Ms. Wolke,

> [f]rom selling, assigning, pleading, distributing, giving away, incumbering, or otherwise disposing of or removing from its present location with the intent to conceal and hide from the jurisdiction ... or removing from any checking or savings account, all or any part of [her] interest, indirect or direct, in the property listed ... real, personal or choses in action, without prior approval of the court upon notice to the United States and an opportunity for the United States to be heard ...

(See Appendix B, p. 32 and C, p. 37). Of the property included in the above orders, Ms. Wolke held a joint tenancy interest (with Mr. Crozier) in her residence, 12498 Avenue C, Yuma, Arizona. She also owned a joint tenancy interest in property at 1912 West 18th Place, Yuma, and twenty acres of farmland in Yuma, Arizona. Further, Ms. Wolke owned much of the jewelry which was also seized under these orders and held at the United States Marshal's Office. Finally, Ms. Wolke, owned the 1980 El Dorado and had a joint tenancy interest in the 1970 Bronco and 1979 Toronado, all of which were seized and impounded by the government pursuant to the restraining orders.

As a result of the government's ex parte seizures, Ms. Wolke has been financially destroyed. First, the twenty acres of farmland were foreclosed upon in the Spring of 1981. Second, although Ms. Wolke and Mr. Crozier filed a bankruptcy action in May of 1981, the mortgage on their residence at 12498 Avenue C has already been foreclosed. Finally, until October 4, 1982, Ms. Wolke's jewelry had been under the continual seizure of the United States Marshal's Office.[3/] Since a final mandate has not yet issued from the Ninth Circuit because of the government's petition for certiorari, this restraining order remains in effect at the present time.

II. Motions to Suppress Evidence.

A. Procedural Background:

Ms. Wolke filed a pretrial motion to suppress evidence seized as a result of numerous searches of her person, personal property and home. After an extensive hearing, on July 9, 1981 the district court entered a detailed order stating its findings of fact and law. (Appendix I, pp. 47-52). The court granted those parts of Ms. Wolke's and Mr. Crozier's motions which challenged the April 9, 1980 warrantless search and seizure of their residence. (Id. at p. 50). Also, the Court

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3/ On August 30, 1982, Ms. Wolke filed an emergency motion with the district court for release of the jewelry and El Dorado. Subsequently, a stipulation was entered into with the government, and an order was entered, wherein the jewelry would be returned to Ms. Wolke and she would be able to sell it, but would be required to file sealed monthly accountings with the Court. (Appendix F, pp. 41-44). Ms. Wolke is still prohibited from selling or otherwise disposing of the El Dorado. (Id.). This motion was necessitated by the utter financial desperation of Ms. Wolke after a two year seizure by the government. On October 27, 1982, another emergency motion was filed by Ms. Wolke, this time in the Ninth Circuit, for permission to sell her furniture, since her home was being foreclosed upon and she was put on notice that she would have to vacate the premises. Such motion was granted subject to the same conditions as the stipulation entered into with the government for return of the jewelry. With the proceeds of the sale of some jewelry and furniture Ms. Wolke was able to save her home at 1912 West 18th Place from foreclosure, although proceedings had already been instituted by the mortgage holders. A record of those events is contained in the clerk's office of the Bankruptcy Court in the District of Arizona, No. B-81-1148-YUMA-HMC. (Appendix G, p. 45 and H, p. 46).

suppressed the evidence on the ground that the search warrant's overbreadth together with the execution thereof constituted an unreasonable search and seizure. (Id. at p. 50). Except for the motions to suppress evidence resulting from the search of the Stein house, all the other search and seizure claims were denied by the district court. (Id.)

The government appealed those portions of the order which granted defendant's motion to suppress the evidence obtained as a result of the illegal searches and seizures of their homes, and the court of appeals affirmed the district court's ruling. See United States v. Crozier, supra, 674 F.2d at 1293.

B. Factual Background:

Between April 7 and April 9, 1980, government DEA agents maintained heavy surveillance on the Wolke and Crozier residence at 12498 Avenue C, as well as the homes and persons of other codefendants. (Reporter's Transcript of Suppression Hearing ("R.T.") III 469; IV 487-491; 548-597). Early on April 9, 1982, DEA agents followed Mr. Crozier's automobile, in which Ms. Wolke and two other individuals were passengers, stopped the vehicle, and arrested Crozier (R.T. III 468-470; 515). Ms. Wolke and the other two individuals were permitted to drive away as there was no probable cause for their arrest (R.T. II 205). Indeed, the car was not even surveilled after its release to Ms. Wolke (R.T. II 205, 210-211).

The residence of Crozier and Wolke had been closely watched by DEA agents using vehicles and an airplane on the morning of April 9, 1980 (R.T. II 200-201; 208). Thus, the agents observed Ms. Wolke, Mr. Crozier and the two others leave the residence together on the morning of April 9, 1980 (R.T. II 208). There were no reports of anyone else having entered the residence from the time these four persons left until the time agents made their warrantless entry into Ms. Wolke's residence that same day (R.T. II, 201). These were the only persons known to have been at the residence during that time (R.T. II, 210) and when the agents were ordered to proceed to Wolke's home, there was no information that anyone was on

the premises or that evidence was in the process of being destroyed (R.T. II 272). In the agent's "rush for time" a telephonic search warrant, available under Rule 41, Federal Rules of Criminal Procedure, was never sought (Id.).

DEA agents arrived at Ms. Wolke's residence as early as 1:00 P.M. on April 9, 1980 and searched the residence and guest house without a warrant (R.T. II, 1910; II 98-200).[4/] Since the government had no information indicating that either evidence or persons were in the residence, (R.T. 11 272; II 210) the only purpose of the warrantless entry into the home was "to establish and secure everything that might have any value as evidence in the investigation being conducted by agent Murphy" (R.T. II 192). The fact is, however, that Ms. Wolke's residence could have been secured through less intrusive methods, from a vantage point outside the property itself (R.T. II 197-199). Not until six hours after the warrantless entry and seizure did ten more government agents finally arrive with a search warrant (R.T. I 98). The egregiousness of the government's actions is further aggravated by its failure to mention its warrantless entry, search or seizure in any of its responses to either Ms. Wolke's or Mr. Crozier's motions to suppress. Since neither Mr. Wolke nor Mr. Crozier was present during the illegal search and seizure, and since no government warrants or pleadings mentioned it, they were unaware of the intrusion. However, three witnesses had seen government agents on the property at different times during

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4/ Apparently, the agents entered the home with a key which was seized either from Ms. Wolke's purse or from the ignition of the automobile at the time of Crozier's arrest earlier that day (R.T. II 192, 209; I 165).

the day (R.T. I 88-98; II 191-211).[5/]

Only after the three witnesses testified during the hearing concerning their experiences did the government announce in open court that it had never disputed its warrantless entry into Ms. Wolke's home (R.T. I 98).

The search warrant, obtained after the house had been searched and seized for six hours, authorized the search and seizure of "amphetamine, precursor chemicals, including methylamine, P-2-P, ether and alcohol, and laboratory apparatus, notes, formulas as well as any indicia of ownership and control of the premises" which were material evidence in violation of Title 21 United States §841 and §846. Based on this, ten DEA agents seized almost one-half of all papers located within Ms. Wolke's residence on the rationale that they represented either "indicia of ownership" and "notes" or "fruits of the crime and expenditure of money" (R.T. I 102-104; 126).[6/]

Among the items seized were: greeting cards, real estate papers, life insurance policies, personal letters from children and other relatives of Crozier and Wolke, a death certificate of Ms. Wolke's former husband, Ms. Wolke's confidential medical and social security correspondence, all of Ms. Wolke's bank statements dating back to 1973 (six years before any investigation on the present case had begun), over fifty photographs, hundreds of miscellaneous bills and receipts, and address books (R.T. 1 102-112). At the time these irrelev-

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5/ Albert Brinkerhoff was a workman at the residence. Agents approached him and required him to show his I.D. An agent also admitted to Brinkerhoff that he had seen the inside of the guest house. On the same afternoon, Shawn Crozier, (Clarence Crozier's son) attempted to enter the residence in order to shower and change clothes. He was refused permission by the agents and was required to leave the premises. Finally, Susan Stein (wife of defendant Allen Stein, and daughter of Clarence Crozier) entered the premises to feed the dog. Agents stopped her in the driveway and permitted her to enter the home only for this purpose. However, she was escorted by agents who opened the door for her and followed her inside. Two additional agents then proceeded to enter the home (R.T. I 88-98; II 191-211).

6/ The language of the warrant itself does not authorize the search and seizure of "fruits of the crime" or "expenditures of money" as evidence of a violation of Title 21 United States Code §841 and §846.

lant items were seized, agents did not even know what they were (R.T. I 109). Further, never was the term "notes" defined for the agents before the search and seizure began. Indeed, only a "minor part" of all the evidence seized had a "special significance" to the government's agents, and many innocent papers were taken only because they were located within another box or container which had also been seized (R.T. II 178). All of these papers remain in the custody of the government at the present time and each item has been read, labeled and filed in an "evidence room" of the United States Attorney's Office.

REASONS FOR DENYING THE PETITION

I

SINCE THE LOWER COURT'S DECISION, THAT BEFORE A PERSON'S PROPERTY CAN BE RESTRAINED PRIOR TO TRIAL THERE MUST BE AN ADVERSARIAL HEARING, IS CONSISTENT WITH TRADITIONAL DUE PROCESS REQUIREMENTS UNDER THE FIFTH AMENDMENT, AND WITH RECENT CASE LAW, REVIEW BY THIS COURT IS NOT WARRANTED.

The lower court held that a defendant is entitled to an immediate adversarial hearing when the government obtains a restraining order and seizes property before trial pursuant to Title 21 United States Code §848(d). United States v. Crozier, supra at 1297. Relying in part upon United States v. Long, 654 F.2d 911 (3rd Cir. 1981), the Court reasoned that:

> [b]efore a Court can issue such a restraining order, however, the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, of two things: one, that the defendant is guilty of violating the Continuing Enterprise statute and two, that the profits or properties at issue are subject to forfeiture under the provisions of §848(a)(2). See United States Code §848(d).... In addition, these determinations must be made on the basis of a full hearing; the government cannot rely on an indictment alone.

674 F.2d at 1298, quoting United States v. Long, supra, at 915. The Court also applied the standards of Rule 65, Federal Rules of Civil Procedure, since §848(d) "does not specify require-

ments for determining when a restraining order should issue." 674 F.2d at 1297.

The government argues that the requirement of such a pretrial adversarial hearing for the purpose of continuing a restraining order under Title 21 United States Code §848 "has grave practical impact" upon the use of the forfeiture remedy. (See government's brief pp. 10). It further asserts that it conflicts with the federal discovery practices under Rule 16, the Federal Rules of Criminal Procedure. It is also the government's position that the disclosure of its witnesses would force a "dress rehearsal" before trial and that in some cases this exposure would threaten their safety or deter them from testifying at trial.[7/]

Yet, contrary to the government's reasoning, this Court has firmly held that due process protections under the Fifth Amendment of the Constitution must override any expediencies in government procedures when the two interests conflict. In Stanley v. Illinois, 405 U.S. 645, 656 (1972), in the context of custody proceedings, Justice White stated:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. [footnote omitted] Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for

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7/ This argument is unpersuasive in light of the fact that the government has a choice of whether its interest in restraining property is paramount to that of preserving the secrecy of its witness list. Instead, the government desires the best of both worlds. The burden of protecting a witness is the responsibility of the government. A defendant should not be required to forego the basic constitutional right to a hearing when his property has been seized in order to make such a responsibility easier or more expedient for the government. Further, in the present case, it was never alleged that Ms. Wolke threatened the safety of any government witnesses so that the argument is totally irrevelant as to her. Clearly, the fact that there might be such allegations against a codefendant cannot have any bearing on Ms. Wolke's right to due process.

> efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disclaims present realities in deference to past formalities, it needlessly risks running rough shod over the important interests of both parent and child. It therefore cannot stand.

See Fuentes v. Shevin, 407 U.S. 67, 90 n. 22 (1972) quoting Stanley v. Illinois, supra; See also, Bell v. Burson, 402 U.S. 535, 540-541 (1971); Goldberg v. Kelly, 397 U.S. 254, 261 (1970). In Ms. Wolke's case, the government's argument that due process is outweighed by the need for efficiency in crime fighting is even weaker, since there is lacking here even the "deference to past formalities" which was present in Stanley v. Illinois, supra. Without question, the government's actions in the present case ran "rough-shod" over Ms. Wolke, since she was deprived of virtually all of her property for over two years without any semblance of due process whatsoever. Thus, in the name of effective deterrence of criminal conduct, Ms. Wolke was financially destroyed before she was even tried for a crime.[8/]

The danger to a "vulnerable citizenry" of the government's position is painfully demonstrated in the present case; the financial ruin suffered by Ms. Wolke can befall any person the government chooses to indict. Weighed against this destruction, the speculation that (a) some of the accused's property might be subject to forfeiture after trial; (b) absent a restraining order, the defendant might dispose of some forfeitable property before trial; (c) the government might be able to trace the proceeds of the property; and (d) the government might

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8/ Moreover, if, as the government asserts, this due process requirement would force prosecutors to stop pursuing such a remedy under §848, it would still have the civil forfeiture remedy available pursuant to §881.

not wish to expose its case in a hearing before trial cannot support a policy of seizing property without the protection of due process.

Such action is particularly egregious in light of the fact that Ms. Wolke is not even named in the continuing criminal enterprise count of the indictment (Title 21 United States Code §848), the section under which the ex parte restraining order was issued. Thus, the property was restrained on the basis of the government's expedient "presumption" that her property was also subject to the restraints of §848(d). Other than a grand jury determination that Ms. Wolke's property was subject to forfeiture, along with Mr. Crozier's, the government was never required to make the necessary showing that its seizure was a proper one. 9/

The government further attempts to defend its ex parte restraining order prior to trial by analogizing such procedure to restraining a defendant's liberty pending trial. This analogy must fail: a defendant is only detained in order to ensure his presence at trial. This procedure has a long history of constitutional validity and is explicitly codified by statute. (Title 18 United States Code §3146). On the other hand, a pretrial seizure of a person's estate is foreign to this country's criminal justice system. Indeed, since the Magna Carta, in personam forfeiture of estate has been historically rejected as a punishment under English jurisprudence. The repugnancy of in personam forfeiture as punishment continued in American jurisprudence as well, for one hundred and eighty

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9/ As stated in the facts, supra, p. 3, prior to obtaining the criminal ex parte restraining orders, the government first instituted civil forfeiture proceedings against the property of Ms. Wolke and Mr. Crozier. However, because counsel for Mr. Crozier filed voluminous discovery requests which the government failed to comply with, the district judge dismissed that civil action. Unlike a criminal seizure, in a civil forfeiture action all discovery tools are open to the aggrieved party, such as interrogatories, depositions, and requests to produce. Therefore, the government's argument that civil forfeiture proceedings constitute a "more significant intrusion" than criminal proceedings is fallacious. No hearing is required in the civil action because the government must adhere to basic civil discovery procedures. Moreover, civil forfeiture procedure is inherently different from the criminal procedure in that it is in rem in character and administrative in function. The government here desires to have it both ways. It dismissed the civil action due to the burdensome discovery requests, and proceeded under an in personam criminal statute ex parte, yet also claims that the defendant is not entitled to an evidentiary hearing.

years, until the enactment of the criminal forfeiture statutes (Title 21 United States Code §848(d) and Title 18 United States Code §1961).

Unlike the restraining of the defendant in order to ensure his presence at trial, the seizure of a defendant's estate is to ensure that such property will be available as a punishment for that defendant after a trial. Under this logic, the government could also seize property in order to assure that the defendant would be able to pay a criminal fine if convicted. Clearly, such reasoning is outside the permissible constitutional interpretation of the Fifth Amendment.[10/]

Thus, the defendant is presumed guilty, and his property is presumed forfeitable, on nothing more than the government's bare allegations that such property is connected to the alleged illegal activity which supports the indictment itself. Such a presumption flies in the face of fairness and ignores the presumption that the defendant is innocent until proven guilty. This type of pretrial seizure of a defendant's property is, by definition, punitive in nature since §848(d) is a penalty provision which comes into play only after a finding of scienter and can only serve the purposes of retribution and deterrence. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963). See also Bell v. Wolfish, 441 U.S. 520, 538 (1979).

Additionally, the government contends that the Crozier Court incorrectly applied the standards of Rule 65, Federal Rules of Civil Procedure to this case since "criminal forfeitures plainly are governed by the Federal Rules of Criminal Procedure." (See Government's Brief at footnote 12). Such an

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10/ In any event, the government's argument is erroneous on the facts of this case, since it sought to hold Ms. Wolke in contempt of court when she filed for bankruptcy in order to preserve her seized property. As stated in the facts, supra, most of this property was ultimately lost through foreclosures despite Ms. Wolke's efforts to save it, thus denying both the government and Ms. Wolke of its preservation. The government's attempt to hold Ms. Wolke in contempt of court for trying to save her property proves that the pretrial ex parte restraining order was completely punitive in nature. This type of result is directly opposite to that accomplished when a defendant is detained before trial unless he can post bail.

interpretation is completely erroneous. The government cites the Federal Rules of Criminal Procedure 7(c)(2); 32(b)(2) and 54(b)(5) as "excluding civil forfeiture proceeding." Id. Yet, Rule 7(c)(2) and 32(b)(2) are altogether silent on the subject. Moreover, the language of Rule 54(b)(5) states nothing about the application of any civil rule to a criminal proceeding, but merely excludes the criminal rules from civil application. In fact, Crozier applied Rule 65 to this case for the reason that both criminal rules are silent on the proper procedure to be taken and §848(d)(2) itself is ambiguous as to when such restraining orders are to be issued. It is absurd to argue that because the Federal Rules of Criminal Procedure fail to explicitly provide for due process requirements when a defendant's property is seized for forfeiture prior to trial, that no due process should be afforded to him. To the contrary, it is precisely because the the Criminal Rules do not set out procedures which provide due process to a defendant under these circumstances, that the Crozier Court was forced to read the standards of civil procedure into the criminal framework. When legislation does not comport with due process safeguards, it is constitutionally deficient and must be corrected by the courts. See Fuentes v. Shevin, supra. Otherwise, it could always be argued that because a statute or a rule fails to explicitly provide for a due process protection, none should be provided to a person. Such reasoning is patently erroneous and irreconcilable with all established principles of constitutional law.

Much of the government's argument before this Court also centers around the issue of whether the Federal Rules of Evidence apply in a hearing for the purpose of continuing an ex parte restraining order. Yet, such an issue is not even properly before this Court. In fact, the issue of the applicability of the Rules of Evidence was never briefed, argued or

referred to in either the trial court or the court of appeals.[11] However, assuming arguendo that such an issue were properly before this Court, Ms. Wolke asserts that it is not yet ripe, as no circuit has directly considered it.[12]

Finally, the Government argues that certiorari must be granted because only a few cases will survive mootness long enough to reach this Court, and this is an issue of great practical significance in criminal forfeiture cases. Such reasoning ignores the very narrow question at hand: Whether a defendant must be afforded due process, by means of a hearing under §848(d)(2), before the government can continue to seize a defendant's property prior to trial. Such a procedural safeguard in no way prevents the availability of this remedy to the government. There is nothing complex or confusing contained in the standards of Crozier which must be complied with in order to affect a pretrial restraining order under §848. Rather, the Court in Crozier merely sets out basic principles of "fair play" which can only lead to just results in accordance with the Fifth Amendment.

11/ Moreover, the government cites the decision of United States v. Spilotro, 680 F.2d 612, 619 n. 4 (9th Cir. 1982), for the proposition that a hearing must be held in accordance with the Rules of Evidence, which would bar admission of hearsay testimony. However, the Court in Spilotro merely mentioned the application of the Rules of Evidence as dictum in a footnote at the end of the decision. 680 F.2d at 619 n. 4. Nowhere in the decision itself is the admissibility of hearsay discussed. Further, the decision does nothing more than affirm the reasoning of United States v. Crozier, supra, in requiring a full evidentiary hearing before the government can continue to seize property for forfeiture prior to trial under an ex parte restraining order.

12/ It should be noted, that the government's interpretation of Rule 1101(d)(3), Federal Rules of Evidence, is not correct. Rule 1101(b) specifically provides that these rules "apply generally to ... criminal cases and proceedings. (emphasis added). Therefore, unless an exception applies under Rule 1101(d) or (e), Rule 802 of the Federal Rules of Evidence, which bars hearsay, would apply to an evidentiary hearing under Title 21 United States Code §848(d). The government attempts to argue that Rule 1101(d)(3) (an exception for preliminary examinations) covers this type of hearing. However, it cites no authority whatsoever for such a proposition. To the contrary, a better view is that the preliminary examinations to which Rule 1101(d)(3) refers are only those provided for in the Federal Rules of Criminal Procedure, Rule 5(c). See United States v. Veon, 538 F. Supp. 237, 248-49 (E.D. Cal. 1982). Further, the fact that in United States v. Long, supra, an evidentiary hearing was conducted by a government agent in the form of hearsay is not dispositive of the issue. There, the question of admissibility of hearsay evidence was not challenged on appeal, nor did the decision ever mention the argument. Also, hearsay is properly admitted into evidence if it is not objected to by the opposing party. Thus, if the defendant in Long never objected to this type of testimony, it would have been properly admitted. See United

In effect, the government's assertion is that if the criminal forfeiture provisions must meet due process requirements it will choose to eliminate such punitive pretrial procedures. Thus it asks the Court to exempt these forfeiture provisions from the application of Fifth Amendment in order that it will be less difficult to seize a person's property and punish him before he has been convicted of a crime. Such an argument does not provide an adequate reason for this Court to grant certiorari. To the contrary, it is in direct contravention of established Supreme Court case law in this regard. See Fuentes v. Shevin, supra, and cases cited therein. Moreover, the government has not demonstrated that this is an issue which lower courts have had a substantial problem in resolving. Thus, the fact that cases will have become moot before reaching this Court is insignificant, in and of itself. Indeed, if future case law continues to be consistent with United States v. Crozier, supra and United States v. Long, supra, it may never be necessary for this Court to reach the question.

In conclusion, Ms. Wolke submits that the lower court's holding is in complete harmony with this Court's decision in-interpreting the requirements of due process in connection with government seizure of a person's property. Indeed, the petitioner's brief utterly fails to acknowledge this court's repeated disapproval of the government's summary seizure of a person's property without a hearing. Fuentes v. Shevin, supra, 407 U.S. 67; C.I.R. v. Shapiro, 424 U.S. 614 (1976); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). "[I]t has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.' " (citations omitted). Fuentes v. Shevin, supra, 407 U.S. at 81. Yet the government's action in the present case is, in fact, a product of such secrecy and one-sided determination. Such ex parte action on the part of the govern-

ment has served to deprive Ms. Wolke of her property without due process of law for over two years. Finally, the Second Circuit's decision on the issue in United States v. Long, supra, is in perfect accord with the Ninth Circuit view. Since no other appellate case law has yet developed, the issue is not yet ripe for this Court's review and the government's petition for certiorari should be denied.

II

THE LOWER COURT'S DECISION SUPPRESSING EVIDENCE BECAUSE OF THE ILLEGAL SEIZURE OF MS. WOLKE'S HOME FOR SIX HOURS PRIOR TO THE ARRIVAL OF A SEARCH WARRANT IS COMPLETELY CONSISTENT WITH THE BASIC FOURTH AMENDMENT GUARANTEE OF A CITIZEN'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, TOGETHER WITH THIS COURT'S INTERPRETATION OF SUCH GUARANTEES.

The analysis of United States v. Allard, 634 F.2d 1182 (9th Cir. 1980), one of the cases upon which the decision below was based, reflects this Court's own view of Fourth Amendment interpretation:

> The Fourth Amendment, it must be remembered, prohibits both unlawful searches and unlawful seizures. Here again the ultimate question to be resolved is whether 'the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Wong Sun v. United States, supra, at 488, 83 S. Ct. at 417 (footnote omitted)

634 F.2d at 1185. In strictly adhering to both the language of the constitution itself and this Court's view of that language's meaning, the Ninth Circuit correctly concluded that the government's illegal entry of a person's hotel room constituted not only a search, but also a seizure. Id. Thus, Allard couched its reasoning within the framework of a continuing illegal seizure of evidence prior to the issuance and execution of a search warrant. It concluded that when government agents illegally and continually "secured" a person's hotel room for three hours while other agents procured a warrant, evidence

obtained after the warrant's issuance was correctly suppressed.

> Accordingly, we hold that where a defendant establishes that the government illegally 'secured' and thereby seized evidence, and that seizure continues while the government procures a search warrant, the defendant has demonstrated a sufficient nexus between the illegality and the subsequently seized evidence notwithstanding any 'independent source' supporting the warrant. Upon establishing this nexus, the burden shifts to the government to demonstrate that it would have both independently discovered and successfully obtained the proffered evidence notwithstanding the illegal seizure.

634 F.2d at 1187. In the present case, Ms. Wolke established, and the government concedes to this Court (government's petition, footnote 14), that there were no exigent circumstances which would have legitimized the government's action of seizing her home for over six hours until a warrant arrived. Further, the government failed to show that it would have "successfully obtained" the proffered evidence despite the illegal seizure. Finally, aside from the warrant itself (obtained six hours after the fact) the government failed to demonstrate that it would have "independently discovered" such evidence, notwithstanding the illegal seizure. Id.

The government asserts in its petition that the eventual issuance and exercise of the search warrant serves to sever the illegal six hour seizure from the post-warrant evidence. In effect, the government seeks to narrow the Fourth Amendment issue into the technical question of whether a facially valid search warrant can, in and of itself, retroactively validate prior illegal police action, thus allowing the admission into Court of illegally seized evidence.

Unless the answer to this question is in the negative, such a rationale would all but abrogate the effectiveness of the Fourth Amendment, which guarantees the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." This Court has consistently expressed a firm commitment to the protection of individuals represented by a broad interpretation of that

language. In United States v. Chadwick, 433 U.S. 1, 7-8 (1977) it stated:

> It cannot be doubted that the Fourth Amendment's commands grew in large measure out of colonists' experience with the writs of assistance and their memories of the general warrants formerly used in England. These writs which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods. Though the authority to search granted by the writs was not limited to the home, searches conducted pursuant to them often were carried out in private residences. See generally, Stanford v. Texas, 379 U.S. 476, 481-485 (1965); Marcus v. Search Warrant, 367 U.S. 717, 724-729 (1961); Frank v. Maryland, 359 U.S. 360 (1959). (Emphasis added)13/

See also, Johnson v. United States, 333 U.S. 10, 13-14 (1948). Indeed, more than a half century ago, this Court decided that property illegally seized from a person's home could not be used as evidence against him in a court of law. United States v. Weeks, 232 U.S. 383 (1914). In reaching this holding, the Court relied on the principles enunciated in still earlier decisions of the Supreme Court:

> In the Boyd Case, supra, after citing Lord Camden's judgment in Entick v. Carrington, 19 Howell's State Trials, 1029, Mr. Justice Bradley said (630):
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> 'The principals laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitute the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where the right has never been

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13/ In its petition, at p. 18, the government incorrectly applies Chadwick to the analysis of the present case. There, a trunk was seized from an automobile. Nowhere in the decision does this Court discuss the warrantless entry and seizure of a home in the absence of exigent circumstances.

> forfeited by his conviction of some public offence, -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.'
>
> In Bram v. United States, 168 U.S. 532, this court in speaking by the present chief justice of Boyd's Case, dealing with the Fourth and Fifth Amendments, said (544):
>
> 'It was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principals of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.'

232 U.S. at 391. Based upon this precedent, the Court in Weeks further concluded that:

> [T]his protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, ... should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392. Clearly, if a Court were to sanction the government's action here, it would also be an affirmance by judicial decision of "manifest negligence if not an open defiance of the prohibitions of the constitution intended for the protection of the people against such unauthorized action." Id. at 394.

Indeed, most recently, this Court has explicitly condemned warrantless searches and seizures of a person's home:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimension's of an individual's home -- a zone that finds its roots in clear and specific

> constitutional terms: 'the right of the people to be secure in their ... houses ... shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core of [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.' Silverman v. United States, 365 U.S. 505, 511. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. New York, 445 U.S. 573, 589-590 (1980). Thus, the lower court's decision in Ms. Wolke's case is in complete harmony with the long established principles developed by this Court.

None of the cases cited by the government attempt to come to grips with the issue of "taint" following a continual illegal seizure of a person's home. Further, none of those cases concentrate their analysis on the "seizure" aspect of the illegal police conduct.[14/]

14/ In United States v. Fitzharris, 633 F.2d 416 (5th Cir. 1980), the Court only addressed the issue of an illegal search and arrest prior to the arrival of a valid warrant. In United States v. Beck, 662 F.2d 527 (8th Cir. 1981), the Court referred to the officer's illegal "entry" prior to the issuance of the warrant, but failed to categorize it as either a search or a seizure. In addition, that case was factually distinguishable from the present case, as the issue of "exigent circumstances" was not even examined by the Court. See 662 F.2d at 530. In United States v. Kinney, 638 F.2d 941 (6th Cir. 1981), the issue centered around an arrest outside the residence and a subsequent search inside preceding a valid warrant. Thus, no continued seizure was involved there. In United States v. Bosby, 675 F.2d 1174 (11th Cir. 1982) the police illegality involved an inventory search of an automobile and the illegal possession and search of suitcases found within it. Again, the Court made no attempt to examine the question of "taint" which arose from such a continuing seizure of the baggage, but concentrated upon the effect of the previous illegal search on the subsequent search pursuant to a warrant. Finally, the facts of United States v. Torgersen, 695 F.2d 682 (8th Cir. 1982) are in no way applicable to Ms. Wolke's case. There, a justified initial entry was made by a fireman pursuant to an emergency call. Subsequently, a warrantless search was conducted by a detective, prior to the arrival of a valid warrant. Again, there was no continuing illegal seizure involved.

In fact, of the cases cited by the government, only United States v. Segura, 663 F.2d 411 (2nd Cir. 1981) appears to conflict on both the law and the facts with the present case. But there too, the Court fails to directly address the issue of an "entry" constituting not only a search but also a seizure. Although the Court in Segura does discuss the fact that agents remained on the defendant's premises approximately nineteen hours prior to the arrival of the warrant, that is where the discussion ends. No attempt is made to examine the question of whether the continuous nineteen hour seizure of the premises "tainted" the post-warrant evidence which was subsequently obtained. Further, Segura fails to examine the inherent dangers of permitting police to unlawfully remain in a person's residence, with no penalty of suppression of evidence or other deterrence for such illegal conduct.

This is precisely what the Ninth Circuit has addressed. In United States v. Allard, supra, the Court wisely followed the reasoning of United States v. Griffin, 502 F.2d 959 (6th Cir. 1974), cert. denied 419 U.S. 1050 (1974), which held that the assertion by police that their discovery was "inevitable" because they planned to get a search warrant and an officer had already gone on such a mission "would as a practical matter be beyond judicial review." 502 F.2d at 961. Moreover, if police were permitted to assert that the evidence was obtained from an "independent source" every time they illegally seized a person's home before a warrant arrived, the warrant requirement would be reduced to an expost facto formality. United States v. Allard, supra, 634 F.2d at 1185, n. 3, quoting Griffin, supra.

Clearly, under Wong Sun v. United States, 371 U.S. 471 (1963), the continuing illegal entry and seizure of Ms. Wolke's home for six hours, in which no break in the chain of events occurred, must "taint" the subsequent search and seizure of evidence pursuant to the warrant. The ultimate search was "come at by the exploitation of that illegality" since the illegal seizure continued up until the exact time the warrant actually arrived. Moreover, the government made no showing that

that it would have "successfully obtained" and "independently discovered" such evidence despite the warrantless seizure. United States v. Allard, supra at 1187.

To allow the government to proceed on an "independent discovery" argument alone would emasculate the concept of exigent circumstances as applied to the Fourth Amendment. For example, police could illegally enter homes and remain for as long as they desired while they awaited the arrival of a search warrant on a theory of "exigent circumstances". Then, if the Court found that no exigent circumstances were, in fact, present, the government could always defend its action on the mechanical application of the "independent source" doctrine. Clearly, this type of reasoning only circumvents the requirement that absent exigent circumstances an entry into a home must be preceded by a search warrant.

Without the threat of suppression of evidence for blatantly illegal conduct, police will have the absolute power to move in and seize people's homes when they so desire, as long as "eventually" a search warrant is obtained. At this point, Ms. Wolke asks the rhetorical question: How long can police remain in absolute possession of a person's home while awaiting a warrant -- twenty-four hours, forty-eight hours, one week?

It is submitted that the lower court's analysis of search and seizure law, as applied to the facts of Ms. Wolke's case, is completely consistent with this Court's philosophy and decisions. Moreover, even assuming arguendo that United States v. Segura, supra, conflicts with the lower court's decisions in this case, the conflict is not of a such a broad magnitude as to require this Court to accept certiorari on the question presented. The government's petition should, therefore, be denied.

III

THE LOWER COURT'S HOLDING THAT THE SEARCH WARRANT FOR THE CROZIER/WOLKE RESIDENCE WAS IMPERMISSIBLY GENERAL AND ALLOWED THE SEIZURE OF MANY IRRELEVANT PAPERS DOES NOT CONFLICT WITH OTHER CIRCUIT DECISIONS OR WITH THIS COURT'S MANDATE THAT GENERAL WARRANTS VIOLATE THE FOURTH AMENDMENT.

At the suppression hearing, Judge Valdemar A. Cordova heard the description and volume of evidence actually searched and seized pursuant to a broad warrant. (See facts, supra, at p. 8, for description of warrant). Specifically, almost one-half of all papers located within Ms. Wolke's home were seized by DEA agents under the rationale that they represented "notes" or "indicia of ownership" (R.T. I 102-104). Alternatively, the government relied on the rationale that this massive seizure resulted from the need to seize "fruits of the crime and expenditures of money", a purpose which was not even authorized in the warrant itself (R.T. I 126).

The district judge ruled that the warrant was overbroad and that its execution constituted an unreasonable search and seizure under the law. In reaching this conclusion the district judge reasoned:

> The search warrant does not state what notes and formulae, nor does it indicate guidelines for the type of documents or physical evidence which constitute indicia of ownership or control of the premises.

(See Appendix I, p. 50). This finding was affirmed by the Ninth Circuit Court of Appeals. See United States v. Crozier, supra, 674 F.2d at 1298. Indeed, the facts developed at the evidentiary hearing supported this conclusion.[15/] In fact,

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15/ See facts, supra, p. 9. DEA Agent Cash admitted that only a "minor part" of all evidence seized had any special significance to him and that many innocent items were taken because they were located in another box or container which was also seized (R.T. II 178). Moreover, the word "notes" was never defined for him and he received no instructions from his superiors as to which "notes" should have been taken, prior to the warrant's execution.

agents testified they knew that Mr. Crozier and Ms. Wolke owned the residence prior to their application for the search warrant and had observed these owners physically at the residence on other occasions (R.T. I 106). Under these circumstances, any claim that the papers were seized as "indicia of ownership" authorized by the warrant is illogical.

The government relies on the authority of Andresen v. Maryland, 427 U.S. 463, 479-482 (1976) in asserting that the search warrant's description met the specificity standards of this Court. This reliance is mistaken. In Andresen, the warrant on its face described with particularity every document which was to be seized in connection with a specific transaction. 427 U.S. at 480. Moreover, this Court in Andresen made clear that a warrant authorizing the search and seizure of a person's papers is extremely vulnerable to a violation of Fourth Amendment guarantees:

> We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to deterime whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the 'seizure' of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

427 U.S. at 482 n. 11.[16/] In the present case,

16/ In this regard, the government also relies upon the holdings of United States v. Smith, 686 F.2d 234 (5th Cir. 1982) and United States v. Cortellesso, 601 F.2d 28 (1st Cir. 1979). Both cases are distinguishable because, as in Andresen v. Maryland, supra, the warrants were extremely detailed on their face. In Smith, the search warrant was for a vehicle and described the exact physical and documentary evidence to be seized which related to a particular transaction. 686 F.2d at 237. In Cortellesso, the warrant was for a clothing store and also referred to specific physical items and documents which were connected with a particular transaction. 601 F.2d at 30. Neither of these cases dealt with the search of a home or with the authority to search and seize a person's most personal papers within that home, pursuant to the broad language of a warrant which on its face failed to list any particular documents or papers.

no such assurance was provided by virtue of the broad description of the warrant itself and the subsequent general seizure which included most of Ms. Wolke's personal and confidential papers. See, United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982), for this same proposition.

Contrary to the government's position, this Court has consistently held that warrants must particularly describe items to be seized, in order to ensure the impossibility of general searches under them and to prevent "the seizure of one thing under a warrant describing another." Stanford v. Texas, 379 U.S. 476, 485 (1965); Marron v. United States, 275 U.S. 192, 196 (1927); Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Andresen v. Maryland, supra, 427 U.S. 463 at 480. Indeed, "as to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Id.

In complete contravention of this Court's mandate, the government obtained a facially overbroad warrant for the search of Ms. Wolke's home and proceeded to seize literally hundreds of papers, most of which were completely innocuous and unrelated to the alleged crime. These facts present a classic case of a sweeping search and seizure under a general warrant which is repugnant to the Fourth Amendment.

The government expresses its fear that the invalidation of similar warrants "if followed, will severely limit the ability of law enforcement agents to seize, pursuant to a warrant, incriminating evidence from a known sight of criminal activity." (government's petition for certiorari at page 21). Ms. Wolke responds that if such police techniques were to be sanctioned by this Court, the right of the people under the Fourth Amendment to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" would cease to exist except as an abstract philosophical value. Although, under the government's reasoning, police would be given nearly unbridled power and authority to zealously pursue crime, in this battle Fourth Amendment freedom would most certainly be destroyed.

In conclusion, the government has failed to demonstrate that the lower court's decision on this issue conflicts with any other circuit holding or applicable decisions of this Court. Therefore, the government's petition for certiorari on this question should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted: January 19, 1983.

TOM O'TOOLE
Federal Public Defender
District of Arizona

Sandra Lynn Slaton

SANDRA LYNN SLATON
Asst. Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AFFIDAVIT OF SERVICE

TOM O'TOOLE, being first duly sworn, under oath, deposes and says:

(1) That he is a member of the Bar of this Court:

(2) That pursuant to Rule 28.2 and 28.4(a), Supreme Court Rules, he has served a copy of the documents listed below on the United States Attorney for the District of Arizona, Phoenix, Arizona, and;

(3) He has forwarded by priority mail the documents listed below to the Solicitor General, Department of Justice, Washington, D.C. 20530; and to Richard Hove, One Kaiser Plaza, Suite 1101, Oakland, California, 94512 on this 19th day of January, 1983:

The documents provided to the above parties are as follows:

(A) Motion for Leave to Proceed in Forma Pauperis;

(B) Opposition to the Petition for Writ of Certiorari;

(C) Affidavit of Service;

(D) The Mailing and Service of the above took place on the 19th day of January, 1983, within the time permitted by Rule 20.1, Supreme Court Rules.

Tom O'Toole
TOM O'TOOLE
Federal Public Defender
District of Arizona

SUBSCRIBED AND SWORN to before me this 19th day of January, 1983.

NOTARY PUBLIC

My Commission Expires:
My Commission Expires June 6, 1986

(39)

A. BATES BUTLER III
UNITED STATES ATTORNEY
DISTRICT OF ARIZONA

JOSE deJESUS RIVERA
Assistant United States Attorney
4000 United States Courthouse
230 North First Avenue
Phoenix, Arizona 85025
Telephone: (602) 261-3941

LODGED
MAR 20 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FILED
MAR 23 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
By _____ DEPUTY CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

80-512

UNITED STATES OF AMERICA,

Plaintiff

v.

CIV ~~81~~ PHX CLH

ONE 1979 FORD BRONCO, VIN U15SLFC5304, its tools and appurtenances; ONE 1979 OLDSMOBILE TORONADO, VIN 3Z57N9E124892, its tools and appurtenances; ONE SINGLE FAMILY RESIDENCE known as 12498 AVENUE C, YUMA, ARIZONA, more particularly described as Parcels 7, 8, and 10 of the Northeast Quarter of Map 13, Book 103, Yuma County, Arizona; ONE SINGLE FAMILY RESIDENCE known as 5417 FRANCIS STREET, YUMA, ARIZONA, more particularly described as Parcel 019, Map 38 Book 111, Yuma County, Arizona; ONE SINGLE FAMILY RESIDENCE KNOWN as 5286 FRANCIS STREET YUMA, ARIZONA, more particularly described as Parcel 039, Map 38, Book 111, Yuma County, Arizona; ONE SINGLE CONDOMINIUM known as UNIT #28, 2490 YOWELL COURT, YUMA, ARIZONA, more particularly described as Parcel 028, Map 84, Book 110, Yuma County, Arizona; ONE SINGLE FAMILY RESIDENCE known as 1912 WEST 18TH PLACE, YUMA, ARIZONA, more particularly described as Parcel 8, Map 24, Book 109, Yuma County, Arizona; ONE UNIMPROVED LOT, NO. 20 of the VALLEY CITRUS ESTATES, further described in Book 5 of Plats Page 108; TWENTY ACRES OF FARMLAND, more particularly known as Parcels 9, 13, 14 and 15 in Northeast Quarter of Map 13, Book 103 Yuma County, Arizona; and VARIOUS ARTICLES OF JEWELRY AND COINS,

Defendants.

O R D E R

APPENDIX A

Upon Motion of the United States, and good cause appearing;

IT IS ORDERED that the matter entitled United States v. One 1979 Ford Bronco, et. al. be dismissed without prejudice.

DATED this 23 day of March, 1981.

CHARLES L. HARDY
UNITED STATES DISTRICT JUDGE

FILED

JAN 16 1981

CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY J. LaVisa
DEPUTY CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, -vs- CLARENCE JAY CROZIER, a/k/a C. J. Crozier, et al, Defendants.	NO. CR-81-019-PHX-VAC O R D E R

This matter having come on motion of the United States of America for a restraining order and establishment of a performance bond pursuant to Section 848 (a) and (d) of Title 21, United States Code, which provides for jurisdiction to enter restraining orders and take such other actions including the acceptance of satisfactory performance bonds in connection with any property or other interest subject to forfeiture pursuant to Section 848 (a)(2) of Title 21, United States Code; Section 1651 of Title 28, United States Code; and this Court's inherent power to make orders necessary and proper to the orderly carrying on of litigation brought within the Court's jurisdiction;

This Court finds that, if this Court fail's to enter this order as prayed for by the United States, that upon Clarence Jay Crozier learning that the property listed below is subject to forfeiture upon conviction on Count II, that Clarence Jay Crozier, a/k/a C. J. Crozier, or his agents, servants, employees, attorneys, family and those persons in active concert or participation with

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him might sell, alienate, encumber, transfer, or otherwise place the property beyond the jurisdiction of this Court or detrimentally affect the Government's interest in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States by defeating such forfeiture.

IT IS HEREBY ORDERED that Clarence Jay Crozier, a/k/a C. J. Crozier; Florence Margaret Wolke, a/k/a Florence Crozier; Alan Terry Stein; Susan D. Stein; John Richard Crozier; their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby enjoined and restrained from selling, assigning, pledging, distributing, giving away, encumbering, or otherwise disposing of, or removing from its present location, with the intent to conceal and hide from the jurisdiction of this Court or removing from any checking or savings account, all or part of their interest, direct or indirect, in the property listed below, real, personal, or choses in action, without prior approval of the Court upon notice to the United States and an opportunity for the United States to be heard, except as specified in this Order.

IT IS FURTHER ORDERED that the property which shall be subject to this Order shall include the following, which is all subject to forfeiture upon conviction on Count II of the captioned indictment, such property allegedly being profits obtained by Clarence Jay Crozier, a/k/a C. J. Crozier, in the charged enterprise and/or property affording a source of influence over such enterprise:

1. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as 12498 Avenue C, Yuma, Arizona, together with approximately 35 acres adjacent thereto:

2. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as 1912 West 18

Place, Yuma, Arizona;

3. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, comprised of approximately 228 acres in Mora County, New Mexico, purchased by Clarence Jay Crozier in March, 1980 from Jerry Hooper, further described in the copy of the warrenty deed attached hereto as Exhibit "B";

4. Various articles of jewelry, coins and related articles seized on April 9 and 10, 1980 from a 1978 Ford LTD, Arizona license WKX-310, and from a 1980 Cadillac El Dorado, Arizona license WHK-345, which items are at present in the custody of the United States Marshal's Service pursuant to seizure, pursuant to Civil Case No. 80-512-PHX-CLH;

5. A 1979 Ford Bronco, California license number 185ZUR;

6. A 1979 Oldsmobile Toronado, California license number 598-XGB;

7. A 1980 GMC pickup truck, Arizona license number 3AX-725;

8. A 1978 Ford LTD, Arizona license number WKX-310;

9. A 1980 Cadillac El Dorado, Arizona license number WHK-345;

10. Tractor, plow, disc equipment and other farm equipment purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

11. A 1979 Chevrolet Caprice, California license number 277-UAB;

12. One hay hauler, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a/ C. J. Crozier;

13. One white trailer and hitch, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

Form OBD-188
APR 1978

14. One horse trailer, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

15. One white and green travel home, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

16. One boat, located at 12498 Avenue C, Yuma, Arizona, or purchased by or on behalf of or otherwise controlled by Clarence Jay Crozier, a/k/a C. J. Crozier;

17. Laboratory apparatus, chemicals, and related items seized on April 9, 1980 from the guest house at the property known as Home Ranch, Inc., having the mailing address of Route 1, Box 120, Wellton, Arizona;

18. Any and all other real or personal property, wherever located, obtained or controlled by Clarence Jay Crozier, a/k/a C. J. Crozier, subject to forfeiture pursuant to the provisions of Section 848 (a)(2) of Title 21, United States Code, including, but not limited to currency, and banking and savings accounts obtained or controlled by Clarence Jay Crozier, a/k/a C. J. Crozier.

IT IS FURTHER ORDERED that prior approval of the Court is unnecessary only if it is necessary to use the property, real, personal, or choses in action, to pay for normal and average living expenses for Clarence Jay Crozier, a/k/a C. J. Crozier, and any lawful dependents supported by Clarence Jay Crozier, a/k/a C. J. Crozier, on the date of the entry of this Order, including food, clothing, normal and average household expenses, medical care, utilities, normal and average expenditures for the upkeep of vehicles, and normal and average expenses for the care of animals located on the property known as 12498 Avenue C, Yuma, Arizona, and the adjacent fifteen acres purchased by Clarence Jay Crozier, a/k/a C. J. Crozier, on or about February 14, 1979. Any expenses

or expenditures in doubt should first be approved by the Court.

The Court will hear from the Government and from the defending party as soon as possible at a date to be set by the Court, on the question of the establishment of a performance bond as prayed for in the Government's Motion.

SO ORDERED this 16th day of January, 1981.

Thelesman G. Gordon
UNITED STATES DISTRICT JUDGE

One copy of Government's Motion for Restraining Order and Establishment of Performance Bond and one copy of Declaration in Support of Motion, etc., and thirty certified copies of Order delivered to U.S. Attorney on January 20, 1981, at the request of Billie A. Rosen, Assistant U. S. Attorney.

W. J. FURSTENAU, Clerk

By P. L. Martin
P. L. Martin, Deputy

LODGED
MAR 12 1981
W. J. PURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FILED
Mar 18 4 55 PM '81
W. J. PURSTENAU, CLERK
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA
BY [illegible] DEPUTY CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. CLARENCE J. CROZIER, et al., Defendants.	CR-81-019-PHX-VAC O R D E R

This Court having considered the Government's Motion to Adopt Seizures and Supplement and Addend Restraining Order filed on March 11, 1981, this Court finds that there is probable cause to believe that Clarence J. Crozier may have an interest in the real property commonly known as Lot #20, Valley Citrus Estates, Yuma, Arizona, and 2490 Yowell Court, Unit #28, Yuma, Arizona, which interest may be subject to forfeiture under Count II of the indictment in the captioned case.

This Court finds that, if this Court fails to enter this order as prayed for by the United States, that upon Clarence J. Crozier learning that the property listed below is subject to forfeiture upon conviction on Count II, that Clarence J. Crozier, also known as C. J. Crozier, or his agents, servants, employees, attorneys, family, and those persons in active concert or participation with him might sell, alienate, encumber, transfer, or otherwise place the property beyond the

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jurisdiction of this Court or detrimentally affect the Government's interest in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States by defeating such forfeiture.

IT IS HEREBY ORDERED that Clarence J. Crozier, also known as C. J. Crozier; Florence Margaret Wolke, also known as Florence Crozier; Alan Terry Stein; Susan D. Stein; John Richard Crozier; their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, be and are hereby enjoined and restrained from selling, assigning, pledging, distributing, giving away, encumbering, or otherwise disposing of, or removing from its present location, with the intent to conceal and hide from the jurisdiction of this Court or removing from any checking or savings account, all or part of their interest, direct or indirect, in the real property listed below, real, personal, or choses in action, without prior approval of the Court upon notice to the United States and an opportunity for the United States to be heard, except as specified in this Court's previous order of January 16, 1981:

1. The real property, with all buildings, structures, fixtures, furnishings and appurtenances, known as Lot #20, Valley Citrus Estates, Yuma, Arizona.

2. The real property, with all fixtures, furnishings and appurtenances, known as 2490 Yowell Court, Unit #28, Yuma, Arizona.

IT IS FURTHER ORDERED that the seizure of the real and personal property listed below be adopted from the civil actions previously filed by the United States (CIV-80-510-PHX, CIV-80-511-PHX and CIV-80-512-PHX) to the captioned case and that the United States Marshal's Service retain, as seized property on behalf of the United States, such real and personal property listed below pending outcome of the litigation on the instant indictment:

1. One 1980 Cadillac El Dorado, Arizona license #WHX-345, VIN #6L57NAE608456 (CIV-80-510-PHX);

2. One 1980 GMC 3/4-ton pickup truck, Arizona license #3AX-725, VIN #TKL24AJ500440 (CIV-80-511-PHX);

3. One 1979 Ford Bronco, California license #185-ZUR, VIN #U15SLFC5304, its tools and appurtenances (CIV-80-512-PHX);

4. One 1979 Oldsmobile Toronado, California license #598-XGB, VIN #3Z57N9E124892, its tools and appurtenances (CIV-80-512-PHX);

5. Real property known as 12498 Avenue C, Yuma, Arizona, more particularly described as Parcels 7, 8 and 10 of the northeast quarter of Map 13, Book 103, Yuma County, Arizona;

6. Real property known as 1912 West 18th Place, Yuma, Arizona, more particularly described as Parcel 8, Map 24, Book 109, Yuma County, Arizona;

7. Real property comprised of twenty acres of farmland, more particularly described as Parcels 9, 13, 14 and 15 in the northeast quarter of Map 13, Book 103, Yuma County, Arizona;

8. Real property known as one unimproved Lot #20 of the Valley Citrus Estates, further described in Book 5 of Plots, page 108, Yuma County, Arizona;

9. Real property known as 1490 Yowell Court, Unit #28, Yuma, Arizona, more particularly described as Parcel 028, Map 84, Book 110, Yuma County, Arizona.

DATED this 12th day of March, 1981.

Waldemar A. Cabou
United States District Judge

cc:
U.S. Marshal ( )
Probation ( )
U.S. Attorney ( )
Probation ( )
Atty for Deft ( )
Defendant ( )
J.S.O. ( )
Order Book ( )
Other: ( )
CRD's Initials:
Date: Nov 19 1980

(438)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DATE May 13, 1981

UNITED STATES OF AMERICA,

PLAINTIFF,

vs.

No. CR 81-019 PHX VAC

CLARENCE JAY CROZIER,

DEFENDANT.

This matter having been under advisement,

IT IS ORDERED denying Defendant Clarence Jay Crozier's Motion for Dissolution of Restraining Order and/or Amendment Thereof; said motion is joined in by defendant Florence Margaret Wolke.

FILED
MAY 13 4 35 PM '81
W.J. FURSTENAU, CLERK
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA
BY [illegible]
DEPUTY CLERK

cc: All counsel of record

Valdemar A. Cordova
VALDEMAR A. CORDOVA
United States District Judge

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APPENDIX D

RECEIVED
JAN 17 1983
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

FILED
JUL 27 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY J. Landies
DEPUTY CLERK

FILED
JUL 23 1981
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FLORENCE MARGARET WOLKE, Defendant-Appellant.	No. 81-1355 DC# CR-81-19-11 VAC Arizona (Phoenix) ORDER

Before: TANG, FARRIS, and CANBY, Circuit Judges

The court having determined that appellant's notice of appeal was timely filed pursuant to the district court's order of June 8, 1981, the July 22, 1981 order remanding this appeal to the district court is vacated.

Appellee's motion to dismiss this appeal for lack of jurisdiction is referred to the panel that hears this case on its merits.

Appellee's emergency motion for an order to show cause why appellant should not be held in contempt for violation of the district court's restraining order is dismissed. Resolution of this question is for the district court in the first instance. Furthermore, the district court retains jurisdiction to proceed with the trial on the merits of the action currently scheduled for September 1981. See 9 Moore's Federal Practice, ¶ 203.11 at 3-54 (2d ed. 1980).

Appellee's motion to consolidate this appeal with appeal 81-1345 is granted. Appellee's motion to expedite the consolidated appeals is granted, and the parties shall comply with the briefing schedule established in appeal 81-1345 by the order of July 22, 1981.

RECEIVED
JUL 27 1981
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

COURTRAN

A. MELVIN McDONALD
United States Attorney
District of Arizona

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Telephone: (602) 261-3953

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. FLORENCE MARGARET WOLKE, Defendant.	CR-81-019-PHX-VAC STIPULATION FOR RELEASE OF PROPERTY

The United States of America, by and through its attorneys undersigned, and the defendant Florence Margaret Wolke, by her counsel, Sandra Slaton, hereby stipulate that the United States will return the below described property to Florence Margaret Wolke for the sole purpose that such property will be used only for reasonable and necessary living expenses by Florence Margaret Wolke and no one else:

1) That part of the jewelry claimed to be Florence Margaret Wolke's seized from a 1978 Ford LTD, Arizona license WKX-310, and from a 1980 Cadillac El Dorado, Arizona license WHK-345 on April 9 and 10, respectively; and

APPENDIX F

2) A 1980 Cadillac El Dorado, Arizona license WHK-345.

The release of such property is subject to the following conditions:

1) That Clarence J. Crozier and Florence Margaret Wolke will jointly segregate the seized jewelry into that claimed by Clarence J. Crozier and that claimed by Florence Margaret Wolke. Any dispute between Florence Margaret Wolke and Clarence J. Crozier, or any challenge by the United States to any claim by Florence Margaret Wolke and Clarence J. Crozier will be resolved by the Court;

2) That Florence Margaret Wolke shall give a full, complete and truthful accounting to the Court by the last day of every month, detailing the sale of any of the jewelry released to her, and detailing the spending of the proceeds of the such sales. No proceeds from the sale of the jewelry and none of the jewelry itself shall be used for any purpose other than reasonable and necessary living expenses of Florence Margaret Wolke. Florence Margaret Wolke shall not sell the jewelry to any relative, or to any co-defendant in the captioned case and shall use best efforts to sell each item for its fair market value. Florence Margaret Wolke shall also set forth in each accounting any other income she has and how such income was spent, including her social security and disability income and benefits. Florence Margaret Wolke understands that the United States will provide the Court with an appraisal of the jewelry so that the Court can compare the sale prices to the appraised value of the jewelry.

3) The accounting to the Court will be ex parte and under seal. The government may inspect the accountings at the conclusion of the trial.

4) Florence Margaret Wolke will immediately return any jewelry she has not needed to sell for reasonable and necessary living expenses to the United States at the conclusion of the trial in the event the jury returns a verdict in favor of forfeiture of the jewelry.

5) Return of the jewelry to Florence Margaret Wolke will be made in accordance with the regulations and guidelines of the Drug Enforcement Administration for return of property.

6) Florence Margaret Wolke will not alienate, sell, dispose of, or encumber the 1980 El Dorado. The vehicle is released to Florence Margaret Wolke for her sole use only, and only until the conclusion of the trial in the captioned case if the jury returns a verdict in favor of forfeiture of this vehicle. If the jury does award forfeiture to the United States, Florence Margaret Wolke will immediately return the vehicle to the United States.

7) Florence Margaret Wolke will maintain the vehicle in a reasonable condition.

The claims of the United States that all of the jewelry and the 1980 Cadillac El Dorado are subject to forfeiture will in no way be adversely affected by this agreement. Also, Ms. Wolke's claims, that all of the jewelry and the 1980 Cadillac El Dorado are not subject to forfeiture, are not affected by this agreement. In no way is Ms. Wolke waiving any of her claims or rights previously asserted by signing this stipulation.

In the event that the Court determines that Florence Margaret Wolke expends proceeds of the sale of the jewelry contrary to this stipulation, uses the items of jewelry contrary to this stipulation, utilizes the vehicle contrary to this stipulation, or in any other manner violates any provision of this stipulation, this stipulation will be null and void, and Florence Margaret Wolke understands that she may be held in contempt of Court.

A. MELVIN McDONALD
United States Attorney
District of Arizona

BILLIE A. ROSEN
Asst. U. S. Attorney

TOM O'TOOLE
Federal Public Defender
District of Arizona

SANDRA LYNN SLATON
Asst. Federal Public Defender

FLORENCE MARGARET WOLKE

O R D E R

IT IS SO ORDERED.

DATE: September 13, 1982.

THE HONORABLE OZELL M. TRASK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DATE: September 13, 1982.

VALDEMAR A. CORDOVA, Judge
District of Arizona

NOV 12 198
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

FILED
NOV 10 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. FLORENCE MARGARET WOLKE, Appellees.	)	No. 81-1355
	)	O R D E R

Before: GOODWIN and TANG, Circuit Judges, and SOLOMON*, District Judge

Subject to such terms and conditions as the district court may prescribe to preserve necessary evidence, the motion of Florence Margaret Wolke for the return of her property is granted.

APPENDIX G

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

REC[illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NOV 23 1982
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

DATE 11/23/82

UNITED STATES OF AMERICA,

PLAINTIFF,

vs.

FLORENCE MARGARET WOLKE, et al,

DEFENDANT.

No. CR 81-19 PHX VAC

IT IS ORDERED, pursuant to the November 10, 1982 Order of the Ninth Circuit Court of Appeals, that Florence Wolke's motion for return of property is granted, with the additional terms and conditions:

(1) That Ms. Wolke refrain from selling or giving away, or otherwise disposing of her clothes and luggage;

(2) That Ms. Wolke agree to return her clothing and luggage to the Government before trial in this case.

(3) That Ms. Wolke submit an accounting or accountings to the Court regarding the proceeds from the sale of furniture and the utilization of the proceeds in accordance with the accounting provisions set forth in the prior stipulation for release of property.

IT IS FURTHER ORDERED that excludable delay pursuant to Title 18, U.S.C. § 3161(h)(1)(8) is found to commence on November 17, 1982 for a total of 6 days.

DATED this 23rd day of November, 1982.

Viktor Florence A. Contreras

United States District Judge

cc: all counsel of record

[illegible]

APPENDIX H

FILED

Jul 9 5 05 PM '81

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. CLARENCE J. CROZIER, et al, Defendants.	NO.CR81-19 PHX VAC ORDER RE: MOTIONS TO SUPPRESS

The Court having had under advisement the motions to suppress of the defendants CLARENCE J. CROZIER, MANUEL I. PINE, ALLEN TERRY STEIN and FLORENCE MARGARET WOLKE, and the Court having duly considered the memoranda attached thereto, the evidence presented in support thereof and the opposition thereto, and the post hearing memoranda, the Court finds that the motions to suppress pertain to the search and seizure of the following: (1) the home ranch; (2) the 1980 Oldsmobile Toronado vehicle; (3) the 1978 Ford vehicle and 14 pieces of luggage; (4) the Crozier residence located at 12498 Avenue C., Yuma, Arizona; and (5) the Stein residence located at 5417 Francis Street, Yuma, Arizona (searches of April 9, 1980 and April 11, 1980).

THE HOME RANCH:

The Court finds that the affidavit in support of the search warrant for the home ranch was sufficient under the law to establish probable cause for the issuance thereof and that the search thereof was reasonable and pursuant to the warrant.

. . .

COURTRAN

APPENDIX I

IT IS THEREFORE ORDERED denying the motions of the defendants to suppress as to the evidence obtained and seized at the home ranch.

THE 1980 OLDSMOBILE TORONADO VEHICLE:

The defendant Allen Terry Stein was arrested about two miles inside the California border in his 1980 Oldsmobile Toronado. No arrest warrant had been previously secured. The Court finds that the arrest took place after the discovery of the clandestine laboratory of the home ranch. The search of the 1980 Oldsmobile Toronado was lawful in that there was probable cause to believe that the vehicle contained contraband, fruits or instrumentalities of a crime, especially where it was stopped on the open highway, and the other facts which the officers had within their knowledge.

A search warrant was issued subsequent to the arrest of the defendant Stein which authorized a search of the vehicle and all luggage contained therein. The obtaining of the search warrant for the luggage in the vehicle was what is Constitutionally required. The issuance of the search warrant and the execution thereof was reasonable and pursuant to law.

IT IS THEREFORE ORDERED denying the motions to suppress in respect to the search and seizure of the evidence contained in the 1980 Oldsmobile Toronado vehicle.

THE 1978 FORD VEHICLE AND 14 PIECES OF LUGGAGE:

All that is necessary to search a vehicle on the highway is probable cause. However, regarding containers such as luggage, such items can only be searched after a search warrant is obtained, absent exigent circumstances. The Court does not find that the courts have distinguished searches of car interiors from locked glove compartments and trunks where the search is premised on the automobile exception. This, or course, is subject to the necessity of obtaining a search warrant for the luggage. The Court finds the Government has a right to remove the vehicle to a police station

or to a place of safety to avoid endangering the safety of the agents or passengers from passing traffic. The 14 containers (luggage) were searched only after a search warrant therefor had been obtained.

The question was raised by the defendants that the search warrant for the 14 pieces of luggage was authorizing only a daytime search and that it was contrary to Rule 41(c)(1), Federal Rules of Criminal Procedure. However, in respect to controlled substances, search warrants are issued pursuant to 21 U.S.C. §879(a) which provides as follows:

> "A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time."

It is evident that §879(a) does not require a specific showing for a nighttime search other than contraband is likely to be on the property or the person to be searched at that time. The Court has considered whether the non-fundamental violation of Rule 41 required suppression where there is no prejudice to the defendant and where there is no evidence establishing or indicating bad faith or deliberate disregard of the rule. The appropriate inquiry when determining whether the exclusionary rule should be applied in particular circumstances is to decide whether unlawful police conduct would be sufficiently deterred by exclusion, to outweigh any detrimental effects of excluding the evidence. The 14 pieces of luggage were already in the possession of the officer when the warrant was obtained and this "non-fundamental violation" not demonstrating prejudice by the tardy execution of the warrant is not sufficient to warrant the exclusion since the search under such circumstances is reasonable within the contemplation of the law.

IT IS THEREFORE ORDERED denying the motions to suppress evidence obtained from the 1978 Ford vehicle and the 14 pieces of luggage.

THE CROZIER RESIDENCE - 12498 AVENUE C., YUMA, ARIZONA:

Ths search warrant for these premises is objected to by the defendants in that the description of items was too general and the agents unlawfully seized items outside the warrant. The warrant in particular described the matters to be seized as "amphetamine, precursor chemicals, including methylamine, P-2-P, ether and alcohol, and laboratory apparatus, notes, formulas, as well as any indicia of ownership and control of the premises." The search warrant does not state what notes or formulas, nor does it indicate guidelines for the type of documents or physical evidence which constitute indicia of ownership or control of the premises. Further, in respect to the search and seizure of physical evidence at the Crozier residence, the evidence indicates that when the agents went to obtain the warrant they directed other agents to secure the premises but that entry therein had not been directed or expected by the agents giving the order. The agents had no facts that would give them probable cause to believe that methamphetamine or any other controlled substance would be located within the residence. The Court therefore concludes that no exigent circumstances existed to justify the entry by the agents into the premises without a warrant.

Further, after the officers arrived to effect entry into the premises, they were on the premises for approximately 6 hours prior to the search warrant arrival. During that time they looked in every room in order to "secure the premises" and under these circumstances they had effectively seized the premises and the contents thereof. U. S. v. Allard, 634 F.2d 1182 (9th Cir. 1981).

Since the Court concludes that the warrant was overbroad and the execution thereof constitutes an unreasonable search and seizure under the law,

IT IS ORDERED granting the motion to suppress the evidence obtained at the Crozier residence located at 12498 Avenue C., Yuma, Arizona.

THE STEIN RESIDENCE - 5417 FRANCIS STREET, YUMA, ARIZONA:

There were two searches of the Stein residence; the first was April 9, 1980 and the second was April 11, 1980. After the arrest of the defendants Crozier and Stein, Agent Murphy directed other agents to proceed to this address and secure the premises, obstensibly to prevent the destruction or disposal of evidence being applied for in the warrant.

A warrantless entry was made into the Stein residence on April 9, 1980 and the premises were secured at least for 6 hours before the search warrant arrived. It is axiomatic that, in general, entry by law enforcement officers into a private residence without a warrant and without consent constitutes an unlawful intrusion. Schmerber v. California, 384 U.S. 757 (1966). The warrant of April 9, 1980 is different than the warrant for the Crozier residence. The search warrant for the Stein residence did not describe any property whatsoever and was merely a description in very general terms, as follows:

> "Material evidence of violation of 28 U.S.C. §841, 846. Manufacture and possession with intent to distribute amphetamine and conspiracy."

The affidavit in support of the warrant does describe with particularity certain personal items, such as gold colored coins, diamonds, emeralds, numerous rings, necklaces, et cetera, as well as books and records of financial transactions.

It is clear that the affidavit may set forth many items of property, contraband, records and documents, and that the Magistrate in his discretion may exclude items. The Court concludes that the search must be pursuant to the warrant and not necessarily pursuant to the affidavit. The warrant does not describe anything to be seized nor does it indicate that the Magistrate exercised his law given discretion in directing the agents regarding the property to be seized. A warrant merely describing "material evidence under 21 U.S.C. §841,846 clearly leaves to the agent the unbridled discretion to seize whatever he determines is evidence in the case. Were the Court to sanction such a general warrant it would be the sanctioning of

the proposition that the property to be seized need not be described with particularity and that the agent can take whatever he decides is evidence of the offense. The Court concludes that the law is to the contrary.

Further, in the search of the Stein residence, the execution thereof was so overbroad as to constitute a general search, and again as in the search of the Crozier residence, the agents effectively seized the premises and the contents thereof contrary to U.S. v. Allard, supra.

Subsequent to the initial search of April 9, 1980, the agents again searched the Stein residence on April 11, 1980. On the April 9th search, they photographed jewelry within the residence and then obtained the warrant in respect thereto. Since the Court has found the search of the Stein residence unreasonable and contrary to law, the Court now finds that the seizure of April 11, 1980 were the fruits of the poisonous tree which stemmed from the illegal search of April 9, 1980.

IT IS THEREFORE ORDERED granting the motions to suppress the evidence obtained from the Stein residence located at 5417 Francis Street, Yuma, Arizona, on April 9, 1980 and April 11, 1980.

DATED this 9th day of July, 1980.

Valdemar A. Cordova
U. S. District Judge

cc:
U.S. Marshal ( )
Probation ( )
U.S. Attorney (/)
Immigration ( )
Atty for Deft ( )
Defendant (9)
Judge ( )
Order Book ( )
Other: ( )
CRD's Initials: AM
Date: July 10 1980

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Respondent, FLORENCE MARGARET WOLKE, pursuant to Rule 46, Supreme Court Rules, and Title 18 United States Code §3006(d)(b), respectfully moves this Honorable Court for leave to file the attached Opposition to the Petition of the United States of America for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs and to proceed in forma pauperis. Counsel undersigned was appointed to represent Ms. Wolke in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: January 19, 1983.

TOM O'TOOLE
Federal Public Defender
District of Arizona

SANDRA LYNN SLATON
Asst. Federal Public Defender
U.S. District Court House
230 North First Avenue
Room 5202, Federal Bldg.
Phoenix, Arizona 85025
Telephone: FTS 261-3561
Attorney for Respondent Wolke

FILED
JAN 21 1983
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-819

UNITED STATES OF AMERICA, PETITIONER,

-vs-

CLARENCE JAY CROZIER AND
FLORENCE MARGARET WOLKE, ET AL.

NOTICE OF APPEARANCE

THE CLERK will enter the appearance of counsel undersigned as counsel for FLORENCE MARGARET WOLKE, who in this Court is the Respondent. Counsel undersigned was appointed to represent Ms. Wolke in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted: January 19, 1983.

TOM O'TOOLE
Federal Public Defender
District of Arizona

Sandra Lynn Slaton

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Telephone: FTS 261-3561
Attorneys for Respondent Wolke

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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Attorney for Respondent Wolke

Office-Supreme Court, U.S.
FILED
FEB 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-819

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE JAY CROZIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-819

UNITED STATES OF AMERICA, PETITIONER

v.

CLARENCE JAY CROZIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

---

1. The first question presented in this case is whether a district court must conduct a full evidentiary hearing on the issue of probable cause before it can enter a *restraining order* under 21 U.S.C. 848(d) to prevent the alienation of property named in an indictment as subject to forfeiture. Respondent Wolke repeatedly attempts to obscure this issue by asserting that the government *seized* all her property without a hearing (see Br. in Opp. 4-5, 11, 13, 16). In fact, the restraining order at issue here (Pet. App. 21a-25a) does not constitute a physical seizure of her property; it simply restricts her ability to dispose of some of that property before a trial is held to determine whether the property should be forfeited to the government. Thus, for example, respondent Wolke's various residences have not been "seized" (cf. Br. in Opp. 5 & n.3); she has been free to reside

in them while the restraining order is in effect.[1] Respondent Wolke's objection (Br. in Opp. 4) that the restraining order is based on speculation that she *might* dispose of forfeitable property is therefore quite mystifying. If she does not want to dispose of potentially forfeitable property, respondent Wolke is not affected by the restraining order at all.

Moreover, contrary to respondent Wolke's suggestion (Br. in Opp. 5, 11), the fact that certain properties have been the subject of foreclosure proceedings is not the result of the order restraining the sale of those properties. Rather, foreclosure is caused by the failure to maintain periodic mortgage payments; the situation is little different from that of a tenant who fails to pay rent. Given the grand jury's conclusion that the restrained properties were purchased with illicit drug profits, it is hardly surprising that respondent Wolke has been unable to maintain the mortgage payments once the arrest of respondents ended the flow of drug profits.[2]

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[1]The fact that some of respondent Wolke's personal property was seized pursuant to search warrants is, of course, irrelevant to the question of the validity of the restraining order.

[2]Respondent Wolke objects (Br. in Opp. 12) that the restraining order is "particularly egregious" because she is not named in the continuing criminal enterprise count. The finding of the grand jury was, however, that all these properties were the fruits of respondent Crozier's continuing criminal enterprise and hence forfeitable. Significantly, Wolke nowhere suggests that that she actually put up any of the money used to acquire the property. In any event, the decision of the court of appeals does not turn at all on the fact that Wolke was not charged with conducting a continuing criminal enterprise. If the court of appeals is, as we contend, incorrect in its view that a full evidentiary hearing on the issue of probable cause is required before the entry of every 21 U.S.C. 848 restraining order, respondent Wolke is free to argue on remand that she has an interest in the properties named in the indictment purchased with her own funds that are not fruits of the continuing criminal enterprise, and hence that, in the particular circumstances of this case, she is entitled to a pre-restraining-order hearing on the forfeitability of her interest. We intimate no view on whether such a hearing would be appropriate.

2. As explained in our petition (Pet. 10-13), review by this Court of the court of appeals' decision is important because the decision severely curtails the availability of the forfeiture remedy by imposing as a prerequisite what amounts to a dress rehearsal of the trial and therefore extensive discovery of the prosecution's case. Respondent Wolke's only answer to this dilemma is to belittle the strong government interest that is at stake. She blithely asserts (Br. in Opp. 10 n.7) that "[t]he burden of protecting a witness is the responsibility of the government," and hence the Court need not concern itself with the danger to government witnesses created by the need to call them to the stand to testify at an adversarial restraining order hearing.[3] If the government needs to protect its witness list, respondent advises, the problem is easily solved by foregoing the restraining order (*ibid.*). That this would eliminate the forfeiture remedy as a practical matter does not concern respondent; she advises that the government can resort to a civil forfeiture remedy (see Br. in Opp. 11 n.8).

These responses cannot justify the decision below. Congress enacted the criminal forfeiture statutes because it found them necessary to deter certain serious crimes. The preexisting civil forfeiture provisions are no substitute for

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[3]Respondent Wolke also dismisses this problem by stating (Br. in Opp. 14-15) that the question whether hearsay evidence is admissible at a restraining order hearing is not before this Court. But obviously an essential element of the determination whether a hearing is appropriate is consideration of the nature of the hearing that would be held. Given the clear implication of the decision below and the Ninth Circuit's explicit statement in *United States* v. *Spilotro*, 680 F.2d 612, 619 n.4 (1982) (see Pet. 12 n.9), it is sheer fantasy to suppose that, if certiorari were denied here, hearsay evidence would be admissible at the restraining order hearing required by the decision below simply because the decision does not explicitly address itself to that issue.

criminal forfeiture,[4] and Congress clearly did not intend to limit the availability of criminal forfeiture to cases where the government is willing to undermine its prosecution by conducting a pretrial rehearsal. The court of appeals' frustration of Congress' intent by the practical evisceration of the criminal forfeiture remedy warrants review by this Court.

3. Respondent Wolke correctly asserts (Pet. 10) that her constitutional guarantee of due process cannot be eliminated for the convenience of the government. But, as set forth in the petition (Pet. 13-15), due process does not require the hearing contemplated by the court of appeals. Just as the determination of probable cause in an indictment is sufficient, without any further hearing, to support pretrial restraints on a defendant's liberty, so too is the determination of probable cause and forfeitability in an indictment (which is based on a determination by an unbiased grand jury, not "the government's bare allegations" (Br. in Opp. 13)) sufficient to support a restraint on the alienation of property named as forfeitable.

Respondent Wolke's attempts to distinguish the two situations serve only to reinforce this analogy. First, like pretrial restraints on a defendant's liberty, the issuance of an order restraining the alienation of forfeitable property is expressly authorized by statute, 21 U.S.C. 848(d) (cf. Br. in Opp. 12). Second, we agree with respondent Wolke's statement (*ibid.*) that the purpose of pretrial restraints on liberty is to ensure the defendant's presence at trial. However,

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[4]Civil and criminal forfeiture statutes are not coextensive with respect to the property they cover and, moreover, as is demonstrated in this case, resort to civil forfeiture is often impossible because it exposes the prosecution's criminal case to civil discovery — the very problem that the decision below introduces into criminal forfeiture proceedings. See Pet. 14 n.11.

although this pretrial restraint also serves the purpose of ensuring that the trial can proceed without violating the defendant's Sixth Amendment right to be present at his trial, surely the primary reason for the restraint is to ensure that the defendant will be available if he is convicted at trial so that the sentence of the court can be executed. The restraining order entered here serves precisely the same purpose — to ensure that the property will still be available at trial so that the judgment of the court can be executed if the property is found to be forfeitable. Cf. Br. in Opp. 13.

4. With respect to the Fourth Amendment issues raised in the petition, respondent Wolke does not deny that the decision below and *United States* v. *Allard*, 634 F.2d 1182 (9th Cir. 1980), on which it relies heavily, conflict with the Second Circuit's decision in *United States* v. *Segura*, 663 F.2d 411 (1981), petition for cert. pending, No. 82-5298 (see Br. in Opp. 22-23). Moreover, she is unable to distinguish several of the other cases cited in our petition (Pet. 19-20) —one of which expressly rejected *Allard* — on any basis other than that the courts did not follow the precise analysis set forth by the Ninth Circuit (see Br. in Opp. 21 n.14). That "distinction" does not alter the fact that evidence discovered pursuant to a valid warrant search that was preceded, but not tainted, by an illegal entry would be suppressed in the Ninth Circuit and admitted in several other circuits. Thus, there is no basis for respondent Wolke's conclusory assertion (*id.* at 23) that "the conflict is not of * * * such a broad magnitude as to" warrant certiorari. To the contrary, the "magnitude" of the conflict continues to increase. Since our petition was filed, the New York Court of Appeals has also expressly rejected *Allard* and held that evidence seized pursuant to a search warrant untainted by a previous illegal entry should not be suppressed. *People* v. *Arnau*, 32 Crim. L. Rep. (BNA) 2288 (Jan. 12, 1983). This conflict in the lower courts warrants review by this Court.

Apart from being unresponsive to the question whether review should be granted, respondent Wolke's contention that the decision below is correct on this issue completely misconceives the well established rule that evidence should be suppressed only if it is tainted by an illegality. The government, of course, does not contend that "a facially valid search warrant * * * retroactively validate[s] prior illegal police action" (Br. in Opp. 18). We do contend that the illegal entry here did not contribute to the discovery of the illegal evidence, which was solely the product of the valid warrant search; hence, the suppressed evidence was not a fruit of the illegal entry (see Pet. 17-19). Respondent Wolke asserts (Br. in Opp. 18) that "aside from the warrant itself * * * the government failed to demonstrate that it would have 'independently discovered' [the] evidence, notwithstanding the illegal seizure." But as explained in our petition (Pet. 18-19), it is undisputed that the police lawfully could have secured the premises from the outside, and thus the evidence surely would have been discovered pursuant to the warrant whether or not the illegal entry took place. The only way such discovery could have been avoided would have been if the persons inside the residence (and there were no persons inside the Crozier residence) had destroyed the incriminating evidence while the officers were awaiting the warrant; surely the Fourth Amendment does not exist to guarantee the availability of this option.

5. Respondent Wolke suggests (Br. in Opp. 24-26) that evidence seized pursuant to the Crozier warrant correctly was suppressed because the seizures exceeded the scope of the warrant. Assuming arguendo that some materials were seized that were beyond the authorization of the warrant, that would not be grounds for suppressing all of the evidence as the court of appeals did, at least in the absence of a finding that the officers flagrantly ignored the limitations of the warrant. See, *e.g.*, *United States* v. *Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir.

1978). There was no such finding here; indeed, the opinion of the court of appeals plainly indicates that it struck down the warrant itself as overbroad on its face without reference to the manner in which the search was executed (see Pet. App. 6a-7a), and hence the scope of the actual seizure is irrelevant here. As stated in our petition (Pet. 20-21), the warrant (set forth at Pet. 6 n.6) specified certain chemicals to be seized and was drawn as narrowly as possible in authorizing a search for notes and formulas at a particular site that are evidence of drug manufacture. The courts routinely have approved such warrants. See, *e.g.*, *United States* v. *Christine*, 687 F.2d 749, 753 (3d Cir. 1982); *United States* v. *Malik*, 680 F.2d 1162 (7th Cir. 1982); *United States* v. *Brock*, 667 F.2d 1311, 1322 (9th Cir. 1982). The decision of the court of appeals invalidating the warrant as general is inconsistent with *Andresen* v. *Maryland*, 427 U.S. 463, 479-482 (1976), and, if followed, will severely limit the ability of law enforcement agents in the Ninth Circuit to obtain documentary evidence from a known site of criminal activity.

CONCLUSION

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General

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